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CASE NO.: 1997-SDW-00005

FILE NO.: 8-1700-97-003

In the Matter Of:

DAVID W. HALL,
Complainant

v.

U.S. ARMY, DUGWAY PROVING GROUND
Respondent

APPEARANCES:

Mick G. Harrison, Esq.
For the Complainant

Jack C. Skeen, Esq.
For the Respondent

Before: DAVID W. DI NARDI
District Chief Judge

RECOMMENDED DECISION AND ORDER

The above-referenced matter is a complaint of discrimination under Section 1450 of the Safe Drinking Water Act, 42 U.S.C. 300j-9(i); Section 322(a) of the Clean Air Act, 42 U.S.C. 7622; Section 110(a) of the Comprehensive Environmental Response, Compensation, and Liability Act 42 U.S.C. 9610; Section 507(a) of the Federal Water Pollution Control Act, 33 U.S.C. 1367; Section 7001(a) of the Solid Waste Disposal Act, 42 U.S.C. 6971; and Section 23(a) of the Toxic Substance Control Act, 15 U.S.C. 2622. The formal hearing was held pursuant to the implementing regulations found at 29 C.F.R. Part 24 and Part 18. The following abbreviations shall be used herein: ALJX for an exhibit offered by this Administrative Law Judge, CX for a Complainant's Exhibit, JX for a Joint Exhibit and RX for an Exhibit offered by Respondent.

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BACKGROUND

On February 13, 1997 David W. Hall, Ph.D., (Complainant) filed a complaint of retaliation against the U.S. Army, Dugway Proving Ground ("Dugway" or "Respondent"). (ALJX 1) Complainant, a Dugway chemist, alleges that he has been subjected to a pattern of retaliatory treatment at work culminating in his forced retirement on June 12, 1997, and has been otherwise discriminated against as a result of his having engaged in activity protected under the employee protection provisions of the whistleblower statutes involved herein. This complaint was investigated by OSHA and referred to the Office of Administrative Law Judges under cover letter dated April 17, 1997. (ALJX 2)

A fifty-seven (57) day hearing was held before the undersigned commencing on June 7, 2001 in Salt Lake City, Utah. All parties were present, had the opportunity to present evidence, and to be heard on the merits.

Post-Hearing Exhibits

The following post-hearing evidence has been admitted into the record:

Exhibit No.	Item	Filing Date
JX 1	**Complainant's Stipulation of Alleged Protected Activities of Complainant and Actions of Respondent Employer At Issue (this document constitutes the Complainant's theory of the case).**	12/14/01
RX 311	Deposition Testimony of Dale Lee Thompson	01/28/02
RX 312	Deposition Testimony of Robert Lawrence Horalek	01/28/02
RX 313	Deposition Testimony of Beverly Rainelle Beck	01/28/02
RX 314	Deposition Testimony of Steven Brimhall	01/28/02
RX 315	Deposition Testimony of John Doe (a pseudonym used for privacy purposes)	01/28/02

RX 316	Deposition Testimony of Jerry Steelman	01/28/02
RX 317	Deposition Testimony of William C. Christiansen, Ph.D	01/28/02
RX 318	Deposition Testimony of William C. Christiansen, Ph.D. (Vol. II)	01/28/02
RX 319	Trina Allen Stipulation	01/28/02
RX 320	Preliminary Matters	01/28/02
RX 321	Stipulation of David W. Hall's Weight	01/28/02
RX 322	September 1989 field screening inquiry of Dr. Hall's complaint against Captain Stan Citron - the 1989 and 1997 statements of Deanna Carlson are also admitted pursuant to the **Seater** rule.	01/28/02
RX 323	January, 1994 issue of the **Army Chemical Review**	01/28/02
RX 324	November 30 and December 6, 1996 articles in the **Salt Lake Tribune** and the November 28, 1996 article in the **Desert News** related to the allegations of Gary Millar.	01/28/02
RX 325	Supplemental Testimony of William Dement, Ph.D.	01/28/02
RX 326	March 14, 1997 **U.S. Army News Release of the Army Public Affairs Office**	01/28/02
RX 334	DOD Directives Systems Transmittal, Change I	01/28/02
RX 335	Families Against Incineration Risk Web Page article entitled "Safety Problems at the incinerator	01/28/02
RX 336	Titled FM (Army Field Manual)	01/28/02

	3-9, “BZ”	
RX 338	January 14, 2002 article in the **Salt Lake Tribune** relating to the reporter’s interview of Dr. Hall (the interview does not violate this Court’s sequestration **ORDER** as the formal hearings ended on December 14, 2001 and most of the post-hearing depositions had been taken as of that date).	01/28/02
RX 327	Deposition Testimony of Dr. Clark G. Hoffman	01/30/02
RX 328	Deposition of Carl Jorgensen	01/30/02
RX 329	Deposition of Carol Nudell	01/30/02
RX 326	March 14, 1997 Executive Summary in re “Tooele Safety Report”	02/04/02
RX 330	One page spread sheet showing Dr. Hall’s work with chemical agent	02/04/02
RX 337	June 3, 1996 Memorandum from the Assistant Secretary of Defense	02/04/02
RX 331	Deposition Testimony of William R. Brankowitz	02/04/02
RX 332	Deposition Testimony of Maria Di Marco	02/04/02
RX 334	Two changes referenced in the Reynolds’ deposition	02/04/02
RX 326	March 14, 1996 Executive Summary in re “Toelle Safety Report”	02/04/02
RX 339	January 31, 2002 fax transmission containing thirteen (13) pages of newspaper articles relating to Gary Millar’s status as a whistleblower	02/04/02
RX 340	November 7, 1996 telephone conversation record signed by the late Dennis Bodrero	02/04/02

RX 341	June 5, 2001 Deposition Testimony of Peter Michael Harvey, Ph.D.	02/11/02
RX 342	Department of the Army Pamphlet 40-173	02/11/02

The parties' post-hearing briefs have been identified for the record as follows:

RX A	Respondent's Initial Brief	05/03/02
CX A	Complainant's Initial Brief	05/08/02
RX B	Respondent's Reply Brief	05/23/02
CX B	Complainant's Reply Brief	05/28/02
RX C	Respondent's Supplemental Reply Brief	05/28/02

The record was closed on May 28, 2002 as no further documents were filed.

I. CONCLUSION

While there have been fifty-seven (57) days of hearings and while the record consists of a plethora of documents, this whistleblowing case boils down to the following simple conclusion:

David W. Hall, Ph.D., is a dedicated, conscientious and highly-motivated public citizen who has manifested these qualities throughout his many years as a public servant, no matter the task assigned.

Many administrations, beginning at the highest levels of the federal government and continuing with the current President, have consistently encouraged federal employees to report examples of waste, fraud or abuse, or to engage in so-called whistleblowing, and such employees have been told they may do so with impunity and without fear of reprisals, retaliation, harassment and/or disparate treatment. This "no fear" attitude is especially important today, given the events on "9/11".

While employees are encouraged to use the chain-of-command, they are also told they may make their complaints to third-parties, should their internal complaints not bring about the necessary

correction. Dr. Hall numerous times attempted to utilize the chain-of-command but each attempt not only produced a lack of results but also brought about instances of reprisals, harassment, retaliation and disparate treatment.

Dr. Hall, frustrated with the futility of his internal complaints, then went outside his chain-of-command and reported his public safety and public interest concerns to third-parties, usually to appropriate officials of the State of Utah ("State"). These reports similarly resulted in blatant instances of reprisals, harassment, retaliation, disparate treatment, as well as shunning by his co-workers.

The record reflects that one of his miliary supervisors actually placed him under a "gag" order whereby he was told in writing that he could not go outside his agency with his complaints. In this regard, **see** TR at 5889-5890. In my many years of presiding over these cases, I have seen such restriction only once before. The etiology, motivation and source for that written restriction will be further discussed below.

The totality of this closed record ineluctably lends to the conclusion that Dr. Hall had engaged in protected activities, that the Respondent, through its agents and employees, knew of such activities and that Dr. Hall experienced adverse personnel actions primarily because of such activities.

That is this case in a "nutshell." I shall now further explicate my reasons for the above **CONCLUSION**.

Dr. David W. Hall was employed as a chemist at the U.S. Army Dugway Proving Ground from 1987 until his forced retirement in 1997. The mission of Dugway is to test the equipment of the U.S. Armed Forces, especially the equipment used to protect against chemical and biological agent attacks by the enemies of the United States. Dugway also tests conventional munitions and uses meteorological assets in support of the test mission. It also supports the U.S. Environmental Protection Agency on some testing. (TR 8411) During his tenure Dr. Hall raised a number of concerns with Dugway management and State environmental agency officials, among others, regarding potential and apparent violations of several environmental statutes, including matters relating to detection, identification, potential environmental release of, and potential human exposure to, chemical warfare agents and other hazardous and toxic chemicals.

After a series of hostile and adverse actions were taken against him by Dugway, Dr. Hall filed a complaint with the

Department of Labor in February of 1997 under the employee protection provisions of the Safe Drinking Water Act (SDWA), the Resource Conservation and Recovery Act (RCRA), the Clean Water Act (CWA), the Comprehensive Environmental Response Compensation and Liability Act (CERCLA or Superfund) and the Clean Air Act (CAA) asserting that Dugway had retaliated against him via, **inter alia**, a hostile work environment and suspension of his security clearance. (ALJX 1) Dr. Hall alleged that Dugway retaliated against him because he had raised concerns regarding potential violations of environmental laws at Dugway involving hazardous wastes, hazardous substances, and chemical warfare agent. (ALJX 1) These employee protection provisions of the environmental statutes prohibit discrimination against an employee because the employee has filed, instituted, or caused to be filed or instituted any proceeding under the Act or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of the Acts.

Dr. Hall was forced retire in June of 1997, earlier than he had planned, due to the hostile work environment and threat of imminent action by Dugway to terminate his employment. Dr. Hall, based on his doctor's advice, concluded at that point that it would be intolerable to continue working at Dugway under the circumstances and that such continued work would adversely impact his physical and mental health. By that point in time, Dr. Hall had lived through ten years of hostile treatment which included an involuntary reassignment, lowered performance evaluations, negative comments on his performance evaluations, overt hostility from management including being called a traitor by an Army General, several uncalled for mental examinations, false allegations of misconduct of which he was cleared only to have the same old allegations raised against him years later, disparate treatment regarding working conditions, termination of his surety program (CPRP) approval without notice to him, suspension and recommended revocation of his security clearance following a short notice review by Dugway using irregular procedure, and direct threats from management of termination of his employment if his performance did not improve during a time when the tasks he was assigned and the performance standards being applied were set up to be impossible for him to meet, all part of a conspiracy against him.

An investigation was conducted by the DOL and a hearing was timely requested. (ALJX 4) A number of continuances were requested by Dr. Hall and granted due to serious health problems that Dr. Hall was experiencing. (ALJX 9A, ALJX 15, ALJX 31) Trial eventually began on June 7, 2001 and initial motions were heard by this ALJ, including **Complainant's Motion for Default Judgment**, a motion which was denied. The trial was unusually long and

demanding, taking some fifty-seven (57) trial days plus several days of depositions for purposes of testimony to be placed in the trial record. The last day of formal proceedings was December 14, 2001.[1] The parties were given several extensions to present evidence in support of their respective positions and the record was closed on May 28, 2002.

[1]Many ruling herein were made by this Administrative Law Judge based upon the ARB's decision in **Seater v. Southern California Edison Co.**, ARB Case No. 95-013 (September 27, 1996). This Administrative Law Judge respectfully suggests that the ARB reconsider the **Seater** decision to allow the trial judge to exercise more discretion in rejecting issues, evidence and arguments raised at the hearing. Otherwise, the result is a trial lasting fifty-seven (57) sessions, as has happened here.

II. SUMMARY OF THE EVIDENCE AND FINDINGS OF FACT

A. DR. HALL'S EMPLOYMENT, PROTECTED ACTIVITIES, AND JURISDICTION

1. Dr. Hall's Employment at Dugway

It is undisputed that Complainant Dr. David Hall was a civilian chemist employed by the Respondent Dugway from 1987 until his forced retirement in 1997. It is also undisputed that Dr. Hall's duties at Dugway involved him from time to time in research, analysis (both academic and laboratory), and preparing reports and recommendations regarding identification and detection, toxicity, environmental fate and other characteristics of chemical warfare agents. It is likewise undisputed that Dr. Hall's duties at Dugway involved him in the study of, and making of recommendations regarding, methods for detecting these chemical agents in various media and munitions under various conditions, and in conducting and evaluating tests of various methods and materials proposed for use in defending against hostile use of chemical warfare agents and for neutralizing chemical agents. Dr. Hall, during his tenure at Dugway, raised a number of environmental concerns with Dugway managers and State environmental agency officials, among others. Several significant examples of Dr. Hall's reported concerns are summarized and discussed below. Dugway managers responded, directly and indirectly, with hostility and a series of adverse actions which are identified below. A number of pieces of direct evidence along with a substantial pattern of circumstantial evidence, identified and discussed below, supports a direct conclusion as well as an inference that Dugway took those actions against Hall primarily because of his protected activities.

2. Dr. Hall's Protected Activities

Inadequate Triple X Decontamination Method for Chemical Warfare Agents

Dr. Hall, starting in the 1987 and continuing through 1997, reported internally to Army officials and externally to the State agency his environmental and public health concerns and compliance issues regarding chemical warfare agent contact hazards that remain after application of Army triple X decontamination methods to agent contaminated materials. (TR 2214, 1163, 1380, 1385, 1402, 1653 [Hall]; CX 21) Dr. Hall's reported concern was that the Army failed to properly decontaminate materials, including waste materials, contaminated with chemical warfare agents, and its failure to adequately test materials for residual agent

contamination after attempts at decontamination. Dr. Hall's concern included the Army's failure to warn and protect individuals coming into contact with chemical warfare agent contaminated materials that despite having been subjected to triple X decon methods, they continue to have residual agent contamination undetected below the surface. Dr. Hall's concern included that due to the residual agent contamination below the surface and the inadequacy of triple X decon procedures in dealing with same, it may be impossible to decontaminate some items and these items were not being properly labeled to describe the hazards they posed and were not being properly disposed of by the Army pursuant to RCRA, apparently because of the expense involved.

As there is an on-going need at Dugway and other chemical warfare facilities to do testing, disposal, and handling of chemical weapons and chemical warfare agent, inevitably, like in any industrial environment, problems occur, spills occur, and clothing and equipment get contaminated. As the material gets contaminated, this becomes a significant hazardous waste disposal problem, and a very dangerous one. Thus, the Army needs efficient economical ways of decontaminating equipment and clothing so that it can either be reused or properly disposed of without endangering the environment, the workers or the public.

The Army has historically relied on a triple X chemical decontamination approach, which is intended to make the contaminated material safe for disposal and handling. The problem that Dr. Hall disclosed was that, even though the chemical treatment may be effective in eliminating the vapor hazard in large part from the contamination on the surface, unfortunately for everyone concerned, the chemical warfare agent penetrates below the surface and remains there to be a skin contact hazard and also to be a reservoir of chemical warfare agent to continue to let off gas and pose some vapor hazard. Dr. Hall continually pointed out that the Army had a misplaced reliance on this decontamination method, and would have to either find some other way of truly decontaminating the material or face up to the fact that a continuing skin contact hazard existed on all this material and that it would have to be treated accordingly.

Respondent cites as a general thesis that some of Dr. Hall's claims of protected activities are not cognizable under the six (6) environmental statues involved herein and that claims under non-environmental army regulations also are not cognizable under these statutes; **e.g.**, the complaint about incompatible storage in 1987-1989; the complaint about inadequate triple X decontamination; and claims related to the design and effectiveness of troop combat equipment, **i.e.**, the M-17 and M-40 protective masks. Moreover, Respondent submits that any complaint about tests conducted before

passage of RCRA, CERCLA, TSCA, CAA, CWA and SDWA are likewise not cognizable, **i.e.**, the test plan requiring soldiers to crawl through an area contaminated by Lewisite and mustard mines. (CX 152; TR 4955-59) These issues and defenses will be discussed below.

Improper Storage of Incompatible Ignitable and Explosive Hazardous Waste Chemicals

In the 1987 through 1992 time period, Dr. Hall reported internally to Army officials and externally to the State and to OSHA his environmental and public health concerns and compliance issues regarding improper storage of incompatible, ignitable, explosive and reactive waste chemicals. (TR 11365) This improper chemical storage was not only an OSHA violation, but also a RCRA violation because of the potential for the uncontrolled release of toxic chemicals into the environment resulting from improper hazardous waste storage. (CX 68, 71) Dr. Hall reported this problem in 1987, 1988, and 1989 without success in getting the matter addressed by Dugway despite an OSHA inspection, **see** CX 69, CX 74, CX 75, CX 39 and CX 50, and he then felt compelled to bring the matter to the State's, EPA's and OSHA's attention for enforcement. (CX 81) This improper waste chemical storage issue was investigated by OSHA on Dr. Hall's complaint. OSHA found violations, and enforcement action was taken against Dugway. (CX 40, CX 60, CX 61, CX 62)

Nonetheless, some of these chemicals that had been improperly stored, by some difficult to explain circumstance, found their way into the hands of an employee, who then moved those chemicals improperly to his residential quarters, a scenario which made it a much more dangerous situation, and he continued to store the chemicals illegally until that was later discovered. (CX 41, CX 42)

Dumping of Toxic and Hazardous Chemicals Down the Dugway Chemical Laboratory Drain

In the 1987-1988 time period, Dr. Hall reported his concern over a Dugway practice of disposing of waste solvents and other laboratory chemicals down the Dugway chem lab drain and into the non-permitted sewer system. (Hall Deposition [RX 116], June 5, 2001 p 15-17, 21-22) The Chemical Laboratory Division was instructed by Dugway to dispose of solvents and other chemicals down the drains and calculate amounts disposed as though Dugway were on a permitted sewer system when, in fact, Dugway was not. (**Id.**) Hall disclosed to Don Verbica at the State (and later

internally) this problem of Hall's employer (unnamed and unknown to Verbica at that time) dumping solvents down the drain and into the sewer system, a practice which was not permitted. (**Id.**) Verbica immediately stated that Hall must be from Dugway because Dugway was the only such facility without a permitted sewer system. (**Id.**) Dugway has admitted the practice of dumping chemicals down the drain, including chemicals that had been used to decontaminate or clean agent contaminated materials, and that the State environmental agency stopped the practice because the waste chemicals dumped down the drain were considered chemical warfare agent waste. (TR June 11 p 142-43; TR June 12 p 30, 120, 121)

Complainant had a reasonable belief that the discharge of the sodium hydroxide and ethyl alcohols residue going out the sink related to toxic and hazardous material, thereby constituting a violation of the SDWA. That no administrative or judicial action had taken place against such discharge until this time is no defense herein. Also Complainant reasonably believed that such discharge would adversely affect the drinking water at Dugway. I agree with Complainant that Ms. Carol Nudell knew about and condoned and approved this practice. There is evidence that she may even have directed such discharge.

Site Contaminated with Mustard and Lewisite Agents from Experiments with Soldiers

Dr. Hall disclosed internally and to the State that there existed a contaminated site near the Carr Facility, which should also be a restoration site similar to Simpson Butte, because mines containing a mustard/Lewisite mixture had been exploded in a field and soldiers in protective equipment were required to crawl through it to test the efficacy of their protective equipment. (Hall Deposition [RX 116], June 5, 2001 p 8-9)

Defective Chemical Warfare Agent Gas Masks

In the 1990 time period, Dr. Hall reported internally to Army officials issues regarding use of a silicone rubber gas mask that was defective in allowing chemical warfare agent to be absorbed and penetrate through the mask. (TR 2216-2220 [Hall]) This silicone mask would absorb agent and allow agent to penetrate the mask making it non-protective. (**Id.**) Hall raised this concern at a meeting at another Army chemical/military facility at Aberdeen, Maryland and was never again allowed to attend such meetings. (**Id.**) Hall was informed by workers performing tests on this mask that they were improperly instructed to fake the agent penetration

tests by putting the agent on the glass part rather than the silicone part of the masks. (**Id.**) This mask, the M-40 without the later added protective covering or plate (added to solve the agent penetration problem Hall had identified) is the mask Hall understood was to be used and was used in the Gulf War. (**Id.**) This mask is also used by civilian responders in RCRA and CERCLA emergency response situations at Dugway. (**Id.**)

Mr. Steelman recalled Hall raising the concern about the masks, recalled that silicone gas masks were made and tested and some were fielded. (TR June 12 p 28 [Steelman]) He presumed that these masks were fielded during the Gulf War. (**Id.**)

Dr. Harvey recalled testing that showed that silicone rubber absorbed chemical warfare agent vapor quite efficiently compared to other materials (**i.e.** was one of the worst factors of the materials tested from the point of view of being used as a protective material). (TR June 13 p 24-26 [Harvey])

Union President Michael LeFevre testified that he learned that the M-40 mask allowed fast penetration by liquid agent because of the silicone rubber formulation, and he became concerned about that situation. (TR 4320-4334) This mask was standard issue for the military and Dugway at the time, just before the Gulf War, and would be the mask to be used to respond to an agent incident at Dugway at that time and, presumably, the mask used by most of the troops in the Gulf War. (**Id.**) Mr. LeFevre took his concerns to the Commander Colonel King and received an explanation that LeFevre considered outrageous – basically do not raise the issue because it will hurt morale and hope that only agent vapor and not liquid is encountered in the battlefield. (**Id.**) The project manager for the mask was working on a corrective fix for the mask but it could not have been implemented until after the Gulf War. (**Id.**)

Chemical Warfare Agent Lewisite and Contamination at the Simpson Butte Site

In the 1992-1995 time period, Dr. Hall reported internally to Army officials both in and out of the chain-of-command and externally to the State agency his environmental and public health concerns and compliance issues regarding the existence of chemical warfare agent Lewisite contamination at the Simpson Butte area at Dugway, and the potential for reformation of some forms of Lewisite after disposal and even after attempted decontamination. (TR 11301-11307; Hall Deposition [RX 116], June 5, 2001 p 10-12; TR June 12 [Steelman] p 12; CX 77, CX 78, CX 79, CX 82, CX 83, CX 84, CX 85, CX 86) Dugway was, in fact, misrepresenting to State

regulators that there was no free Lewisite present at the site and only harmless byproducts were present, an assertion which was not the case. (Hall Deposition [RX 116] June 5, 2001 p 11)

Dr. Hall raised this very important concern with his management directly, and with the State, that one of the chemical warfare agents that had been used in past years called Lewisite, which is an arsenic-based chemical warfare agent, after it has been disposed of in the environment for years and notwithstanding attempts to decontaminate it, could nonetheless revert back to actual Lewisite chemical warfare agent in the environment and that certain byproducts of Lewisite are dangerous in their own right. (TR 11314 through 11317; Hall Deposition [RX 116], June 5, 2001 p 10-11; TR June 12 [Steelman] p 12)

As could be expected, this concern certainly was not welcome news for the Army, as the generator and disposer of the Lewisite wastes, because such reformation of Lewisite in the environment from past disposal would result in increased cleanup and disposal liability and costs under CERCLA, as well as reflect CERCLA hazardous substance release reporting violations, and also result in noncompliance with RCRA hazardous waste requirements which mandate containment and very specific ways of disposing of hazardous waste, especially waste that is as toxic as Lewisite. The existence of such reformed Lewisite uncontrolled in the environment could create an imminent hazard to public health and the environment which is subject to an legal actions for injunctive relief under RCRA, 42 U.S.C. Sections 6972(a)(1)(B) and 6973.

The Lewisite reversion issue became focused in a particular incident or problem known as Simpson Butte where there was in fact some Lewisite waste that had been disposed of historically. There had been a historical attempt to decontaminate it, and Dr. Hall and his colleagues were tasked to investigate that particular issue. Dr. Hall reported that the Lewisite was present at the site and Lewisite degradation products were present that were capable of reverting back to Lewisite, even though an attempt had been made at decontamination. (TR 11301-11307; TR 11314 - 11317; Hall Deposition [RX 116], June 5, 2001 p 10-11) One of the dangers Hall pointed out was that the site material sent to labs as samples could contain material that would revert back to free Lewisite posing a danger to lab workers, a fact about which they were not informed. (Hall Deposition [RX 116], June 5, 2001 p 11)

On the other hand, Respondent submits that complaints or comments about the former Lewisite Demilitarization Site do not violate any of the six (6) statutes herein for the following reasons: (1) Complainant’s complaints about this were made in

1995, about 1½ years before the February 12, 1997 effective date of the military munitions rule under RCRA; (2) Respondent now candidly concedes that the Lewisite breakdown products of L-2 and/or L-3 were really worker safety issues, not CAA matter, **citing Kemp v. Volunteers of America**, ARB Case No. 00-069; (3) However, that it occurred at an uninhabited remote site and Dugway is no defense, and I so find and conclude.

Potential Violations Regarding Agents GA, GF and QL

In 1994 and 1995, Dr. Hall raised concerns internally with Dugway that Dugway was handling one or more agents for which they were not permitted under RCRA by the State, and certain inadequacies existed in test procedures for one or more chemical agents. (CX 7, CX 88-92, CX 95, CX 97, CX 98) Dugway admitted that Dugway's RCRA permit did not authorize handling agent GA, although Dugway was handling or had plans to handle GA. (TR June 12 p 14 [Steelman])

I note that Respondent here argues in the alternative that no violation of any of the six (6) statutes has occurred and/or that "potential violations" are not violations of these statutes. I disagree - it is only necessary that a complainant have a reasonable belief that the situation constituted a violation - he/she still retains the protected status even if the situation is determined later not to be a violation. I would also note at this point that it was reasonable for Dr. Hall to believe that the handling of GA in the manner to which he credibly testified was a violation of RCRA, and I so find and conclude.

Mustard Gas (Agent HD) Contamination at the Carr Red Dirt Site

From 1995 through 1997, Dr. Hall reported internally to Army officials and externally to the State and federal EPA his environmental and public health concerns and compliance issues regarding the Carr Red Dirt site having mustard agent contamination. (TR 11301; Hall Deposition [RX 116], June 5, 2001 p 6-10, 18, 20, 41-43) Hall's 1995 concerns were a more substantial follow-up to earlier concerns Hall had in 1987 that Dugway was improperly controlling the analytical work to prevent a valid determination of whether the Carr Red Dirt did contain chemical warfare agent. (Hall Deposition [RX 116], June 5, 2001 p 26-28)

The Carr Red Dirt pile was stored in the open environment from at least 1988 to 1995. (Hall Deposition [RX 116], June 5, 2001 p

18-20) It was the subject of an inquiry by the Army as to whether or not it continued to contain chemical warfare agent given the passage of time. (Hall Deposition [RX 116], June 5, 2001 p 6; CX 44) This vapor and contaminated dust was free to blow in the wind, as the weather would permit, and the agent was detectable by smell. (**Id.**) If it were to be transported or disturbed, the presence of mustard agent would be important to know because if it were handled improperly, the disturbing actions would lead to release into the environment of the dust particles with the mustard agent attached, to blow wherever the wind would take it: into living areas, off-site into public areas, into the water supply, into the air being breathed, and so forth. These circumstances posed a potential uncontrolled release of a very toxic chemical warfare agent. Contractor workers had alleged that they had been exposed to mustard agent while working at the location of the Carr Red Dirt, reflecting Dugway's potential liability for damages if Dr. Hall's concerns proved correct that mustard agent was present. (CX 43)

Defective PINS Device for Identifying the Contents of Recovered Chemical Munitions

In the 1994-1997 time period, Dr. Hall reported internally to Army officials both in and out of the chain-of-command and externally to State and Federal officials his environmental and public health concerns and compliance issues regarding inadequacies in the PINS device, which was relied on to identify and characterize the unknown hazardous waste contents of used and discarded range-recovered chemical and conventional weapons. (TR 11301 through 11307; TR 2946) The PINS device failed on occasion in finding explosives in munitions because of its very poor sensitivity to the element nitrogen, which is present in high percentage in explosives. The PINS development was part of the program to develop the MMD (Munitions Management Device) and the related Drill and Sample Program.

Dr. Hall's concerns included the important fact that the MMD was going to be relying in part on the PINS device, the portable isotopic neutron spectrometer, which Dr. Hall was reporting did not provide complete and accurate information on the chemical contents of unknown munitions. (TR 11301 through 11307) The Drill and Sample PINS Validation Study was a major part of the MMD1 program, and was intended to make it easier to get the State to permit MMD1 when the time came for that. Dr. Hall disclosed that the Army was misrepresenting the accuracy of the PINS device, an important point as the device was to be relied upon in identifying the unknown contents of munitions. Of course, the mishandling of a munition

based on inaccurate information as to its contents could lead to an explosion and the release of highly toxic chemical warfare agent into the environment, and I so find and conclude.

The MMD device was intended to be used to deal with the rather large Army problem of dealing with old discarded munitions, unexploded ordnance - bombs, rockets, and so forth- found “in the field” (sometimes in backyards of civilian residences) which, because of their having been discarded in the past, were not easily identified as to their contents, or as to the risk posed by the munition or whether the munitions have to be exploded or burned on the spot, in the open environment, or whether it is safe to transport them for some more sophisticated means of disposal. Dr. Hall informed the Army that their attempted solution to this problem apparently would not work because they could not accurately identify the contents of these unknown munitions with the PINS device. Even though the Army characterized the Drill and Sample Program initially, before Dr. Hall's whistle blowing, as a “validation” program for the PINS device, the program basically produced evidence that the device was not as effective as planned and the Army later changed its characterization of the Drill and Sample Program and dropped the idea that its purpose was validation of PINS. (CX 115, CX 146)

The State, in response to Dr. Hall’s reporting, required when the Carr Red Dirt was moved, that workers wear proper protective equipment and that monitoring be done. (Hall Deposition [RX 116], June 5, 2001 p 9) Dugway Commander Col. Como eventually acknowledged by an email memo to all employees that some amount of agent had been found in the Carr Red Dirt. (**Id.**)

I note that Respondent refers to “game playing” by Complainant on the Drill and Sample/PINS project. However, Respondent now candidly concedes that Complainant was correct in stating that CK - a nonstimulant - was in one of the munitions, a concession that confirms Complainant’s main argument as to the lack of reliability of PINS. Furthermore, I agree with Complainant that Dugway had unquestioning faith in the PINS technology, and that is the main problem that Dr. Hall had with the PINS device, and I so find and conclude.

I also agree with Complainant that he was not an author of the Final Drill and Sample Report as he had been taken off the project. That the Appendix contained some of his suggestions did not make him an author of the final report - this is more than just playing semantics - this deals with integrity.

Violations Involving the Lakeside Bomb

In the 1995-1997 time period, Dr. Hall reported internally to Army officials both in and out of the chain-of-command and externally to State and federal officials his environmental and public health concerns and compliance issues regarding the Lakeside bomb, a 750-pound bomb that was erroneously thought to contain nonhazardous waste, when, in fact, it turned out to contain hazardous waste. (Hall Deposition [RX 116], June 5, 2001 p 97; CX 8) That bomb was part of The Drill and Sample Program and was one particular example of the difficulties the Army was having in identifying the chemical contents of unknown munitions. In this case the misidentification resulted in the illegal transport of a hazardous waste without the required manifest. (TR p 2947-2949) The essence of Dr. Hall's concerns reported to Dugway managers about the PINS device was that the Army just was not yet able to properly characterize its munitions waste using the PINS device. (Hall Deposition [RX 116], June 5, 2001 p 97) The Lakeside Bomb was a prime example of it, and that failure led to a violation of RCRA, the Resource Conservation and Recovery Act, in that instance, and I so find and conclude.

Misidentification of the Chemical Contents of the M79 Mystery Bomb

In the 1995-1997 time period, Dr. Hall reported internally to Army officials and externally to the State environmental and public health his concerns and compliance issues regarding the M79 mystery bomb and the PINS device defect due to its failure to detect nitrogen in the bomb and its failure to identify the actual fill. (TR June 12 p 44-45 [Steelman]) The actual fill (contents) turned out to be, based on Dr. Hall's work, Cyanogen chloride, rather than the initial mistaken characterizations by others in reliance on the PINS. (**Id.**) Had the Army staff dealing with the bomb at that time had some type of perceived emergency with the munitions, they might well have added bleach decontaminant, which could have resulted in a highly exothermic reaction, a not unlikely scenario. An Army study made it clear that use of a bleach decon could have resulted in harm to the workers.

Concerns Regarding The Chemical Agent BZ Bomblets Study

In the 1994-1997 time period, Dr. Hall reported internally to Army officials both in and out of the chain-of-command and externally to the State environmental and public health agency his health concerns and compliance issues regarding the BZ bomblets specifically and the Drill and Sample Program generally, including

his concerns regarding inadequate decontamination methods for agent BZ. The BZ Bomblet study was a smaller program under the larger MMD1 program, and was not part of the Drill and Sample PINS Validation study.

In 1997, the year that Dr. Hall eventually was forced to retire out of a concern that he was about to be terminated and that his health was being seriously hurt by the retaliation, he continued to engage in his protected activities on the Drill and Sample Program, the PINS device, the MMD device, and the BZ Bomblets. Dr. Hall's whistleblowing, while classic in many respects, takes on particular significance in light of the subject matter. The chemical warfare agents involved are intentionally manufactured by the military to be as toxic as possible to human beings for the purpose of disabling the enemy. These agents are more dangerous than even the more toxic hazardous waste that one encounters at Superfund and Resource Conservation and Recovery Act sites. These agents are uniquely and extremely toxic and designed to be so specifically to the human species.

Respondent points out that it was unable to get Complainant to complete the BZ treatability report and that it properly informed Complainant of the seriousness of his nonperformance in early 1997.

I disagree with this argument because Dr. Hall's performance was delayed by the obstacles to which he was subjected by his supervisors and those of his co-workers who participated in the conspiracy against Dr. Hall. Moreover, I disagree with Respondent because Mike LeFevre is a knowledgeable union official, was well aware of what was going on in the so-called Ditto Technical Area, especially as it was impacting Dr. Hall, and favorably testified for Dr. Hall at the hearing, thereby jeopardizing his future prospects at Dugway.[2]

I note that Respondent posits that the tasks assigned to Dr. Hall were proper and not that complicated. However, while this may be partially true, the fact remains that obstacles were placed in Dr. Hall's way - he was frustrated at every turn by the actions of his supervisors and certain co-workers who were viewed as "team players" all of whom were part of the conspiracy against him.

3. Jurisdiction

Respondent submits that this Court has no jurisdiction over

[2]Mr. LeFevre is reminded that he enjoys the same protected status as the whistleblower for whom he testified in open court.

any of the complaints filed by Dr. Hall (1) because the military affairs of the U.S. Army cannot be reviewed or second - guessed by this tribunal, (2) because the Respondent is not subject to any of those six (6) statutes as Congress has not waived sovereign immunity for the employee protection provisions of these statutes and (3) because these alleged violations only involve state environmental provisions that actually are more stringent than the U.S. Code provisions.

I disagree and this Court's ruling and discussions relating to these issues are reflected in the official hearing transcripts, and those portions are incorporated herein by reference. Each of the statutes will now be further discussed.

RCRA Jurisdiction

The DOL's jurisdiction for hearing Dr. Hall's complaint under RCRA is apparent from numerous exhibits and abundant testimony in the record as most of Dr. Hall's protected activities involved potential violations of hazardous waste laws (the chemical warfare agents were and are classified as RCRA hazardous wastes). Dugway had a RCRA hazardous waste permit. (TR June 12 p 21) The lab chemicals improperly disposed of down the lab drains until Dr. Hall and the State stopped the practice clearly were RCRA wastes. (Hall Deposition [RX 116], June 5, 2001 p 21-22; TR June 11 p 142-43; TR June 12 p 30, 120, 121) The agents and agent contaminated wastes are RCRA wastes. (TR 2933) The Lewisite (because of its arsenic content) and the mustard agent contaminants found at the Simpson Butte site, the Carr Red Dirt Site, and the mustard/Lewisite mine testing site are RCRA regulated wastes, and would also be subject to enforcement action under RCRA's imminent and substantial endangerment provisions. (TR 2960 [Moran regarding Carr Red Dirt being a RCRA issue]; 40 C.F.R. part 261; 42 U.S.C. Sections 6972(a)(1)(B), 6973) The BZ bomblets were also RCRA regulated hazardous wastes at a minimum because of the reactive-explosive-ignitable components of the bomblets. The PINS device was being relied on by Dugway to identify whether or not certain munitions contained chemical warfare agent waste, which is a RCRA regulated waste (P999 and F999 RCRA waste codes in Utah).

Safe Drinking Water Act and Clean Water Act Jurisdiction

Safe Drinking Water Act and Clean Water Act jurisdiction also exists in this case. One example of Dr. Hall's protected activity that invokes such jurisdiction is his reporting of disposal of waste chemicals down the Dugway chem lab drain and into the non-

permitted sewer system and unlined lagoon. (Hall Deposition [RX 116], June 5, 2001 p 15-17, 21-24) As already noted above, Dugway has admitted the practice of dumping chemicals down the drain and that the State environmental agency stopped the practice because the waste chemicals dumped down the drain were considered chemical warfare agent waste. (TR June 11 p 142-43; TR June 12 p 30, 120, 121) These chemicals eventually discharged into an unlined pond or lagoon (Hall Deposition [RX 116], June 5, 2001 p 21-24), **i.e.**, into the environment where the chemicals could migrate to groundwater or surface water (**Id.**), and I so find and conclude.

The Clean Water Act was enacted, "to restore and maintain the chemical, physical and biological integrity of the Nation's waters. . . . [I]t is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985[.]" 33 U.S.C. § 1251(a). To achieve that goal, Congress enacted, among other provisions, Section 301(f) of the Clean Water Act which provides, in pertinent part: "Notwithstanding any other provision of this chapter, it shall be unlawful to discharge **any** . . . chemical . . . warfare agent . . . into the navigable waters." 33 U.S.C. 1311(f) (emphasis added). Thus, even a tiny amount of agent migration into surface water as a result of the Dugway practice of dumping chemicals down the drain and allowing uncontrolled agent land disposal sites to go unremediated would be a violation of the CWA, and I so find and conclude.

Hall's reporting of Lewisite contamination at uncontrolled disposal sites at Dugway also invokes the SDWA and CWA because of the potential for the migration of contaminated rainwater into groundwater and surface water sources. The potential for such runoff of Lewisite chemical warfare agent contamination at Dugway is documented in the record. (CX 82; TR June 19 p 1388-97) Contaminants, including visible discoloration that was not identified, as well as chemical warfare agents or their breakdown products, were found in water wells and ground water at Dugway and may have migrated into the wells and ground water as a result of the past uncontrolled land disposal of chemical agents and other chemicals. (TR 3095–3104) This further solidifies jurisdiction under the SDWA, and CWA, as well as under RCRA and CERCLA. Under the circumstances, Dr. Hall's concerns that dumping chemicals down the drain into sewers and unlined lagoons, and allowing old chemical agent dump sites to go unremediated, posed a risk of ground water and surface water contamination, and therefore a potential drinking water threat, had a reasonable basis, and I so find and conclude.

CERCLA Jurisdiction

Dr. Hall's internal and external reports regarding old chemical agent, waste and munitions land disposal sites where chemical warfare agents HD (mustard) and Lewisite could still be present uncontrolled in the environment invokes the jurisdiction of CERCLA. These sites whose existence and/or details of their contamination were disclosed to the State and internally to Dugway officials by Dr. Hall included the Simpson Butte site, the Carr Red Dirt site and the site near the Carr facility contaminated with mustard and Lewisite from the experiments done with soldiers in the agent mine field there. Dr. Hall raised the issue as to whether the mine field site should also be a restoration (cleanup) site similar to Simpson Butte. (Hall Deposition [RX 116], June 5, 2001 p 8-9) Old land disposal sites containing dangerous chemicals are subject to remedial and enforcement action by EPA under CERCLA. 42 U.S.C. Sections 9604, 9605, 9606, 9607, 9613, 9616; 40 C.F.R. part 300 (National Contingency Plan regulations implementing CERCLA). Releases of hazardous substances into or from such sites are required to be promptly reported under CERCLA. 42 U.S.C. Section 9603. Lewisite and its byproducts would be regulated as a hazardous substance under CERCLA and a hazardous waste under RCRA because of the arsenic content, and I so find and conclude. 40 C.F.R. part 300; 40 C.F.R. part 261.

Clean Air Act Jurisdiction

A number of Dr. Hall's protected activities involved concerns that chemical warfare agent was present uncontrolled in the open environment, such as Lewisite at the Simpson Butte site and Mustard agent at the Carr Red Dirt site, where release to the air was not only possible but unavoidable due to vapor release via volatilization and contaminated dust/particulates releases via the wind. The Carr Red Dirt pile, stored in the open environment, was the subject of an inquiry by the Army as to whether or not it continued to contain chemical warfare agent given the passage of time. (Hall Deposition [RX 116], June 5, 2001 p 6-8)

Vapor and contaminated dust from the site was free to blow in the wind as the weather would permit and the agent at the site was detectable by smell and by air testing, confirming some release to the air. (**Id.**) Dr. Hall had detected the odor of mustard agent coming off the Carr Red Dirt in 1988 and the dirt was left on site until at least 1995, presumably releasing agent to the air over that entire seven year period. (**Id.**) The State, in response to Dr. Hall's reporting, required when the Carr Red Dirt was moved that workers wear proper protective equipment and that monitoring be done. (**Id.** at p 9)

Dr. Hall had a good faith belief that releases to the air of agent from the Carr Red Dirt posed at least a potential violation of the Clean Air Act, and I so find and conclude. (**See**, **e.g.**, Hall Deposition [RX 116], June 5, 2001 p 37, 39, 64)

Dr. Hall also raised concerns regarding the improper storage of waste chemicals which could have caused a fire and explosion and subsequent release of toxic chemicals to the ambient air. Once released to the air in such an incident, or from wind at the uncontrolled dump sites, there is nothing to prevent the wind from carrying the contaminants off-site, as occurred during the 1968 so-called Dugway sheep kill incident where chemical agent released to the air on-site traveled off-site and killed several thousand sheep, an event well documented in this closed record.

B. DUGWAY'S KNOWLEDGE OF DR. HALL'S PROTECTED ACTIVITIES

At the outset Respondent posits that Dr. Hall has offered no evidence that Respondent was aware that he had reported alleged environmental violations to any of the four (4) divisions of the Utah Division of Environmental Quality. I disagree and the Respondent's actual knowledge of Dr. Hall's protected activities through its military personnel and civilian employees will now be discussed.

Dugway management clearly knew of Dr. Hall's protected activities because, as established throughout this trial record, including at transcript cites given above in the discussion of each protected activity of Dr. Hall, Dr. Hall brought his concerns directly to his management. He also brought concerns to the State, who then indirectly, sometimes unintentionally, informed his management that Dr. Hall was disclosing his concerns to them. Sometimes this State disclosure of Dr. Hall's protected reporting to them occurred because of the rather unique issues that Dr. Hall raised internally, and then raised with the State, which then resulted in State follow-up with Dugway. Even though the State may have attempted to protect his anonymity, the nature of the issue being disclosed sometimes led to managers at Dugway essentially seeing Dr. Hall's hand in the concerns brought to them by the State.

In the early days of Dr. Hall's protected activity, he was doing this protected activity very openly. He was attempting to get the problem resolved internally. He was not attempting to hide his concerns from management. Dugway management was very well aware that Dr. Hall was raising these concerns. For example, Dr. Hall

testified in August of 1991 in an Army investigation of the improperly stored waste chemicals, and there was no doubt in the Army's mind at that time that it was Dr. Hall who had raised these concerns to OSHA, because he told them directly, during their own inquiry. (CX 60, CX 61) Dr. Hall informed Dugway managers of his Safe Drinking Water Act and Clean Water Act concerns with Dugway dumping waste chemicals down its drains into an unpermitted sewer system and into unlined lagoons. (Hall Deposition [RX 116], June 5, 2001 p 68, 76-77) Dugway managers were informed of Dr. Hall's RCRA concerns throughout his tenure at Dugway, and I so find and conclude. (Hall Deposition [RX 116], June 5, 2001 p 89-93)

Notwithstanding his discomfort in reporting concerns to management in the later years of his tenure at Dugway, Dr. Hall nonetheless continued making protected reports directly to Dugway management. For example, in the 1995-1997 time period, Dr. Hall reported his concerns about the Carr Red Dirt containing mustard agent directly to Army officials within and outside his chain-of-command, and reported to State officials in the presence of Army officials. (Hall Deposition [RX 116], June 5, 2001 p 41-45, 67) Hall also reported his concerns about the Simpson Butte Lewisite contamination directly to his Dugway managers. (Hall Deposition [RX 116], June 5, 2001 p 47; TR June 12 [Steelman] p 12) On the BZ bomblets issue, a portion of Hall's concerns were directly expressed in his draft reports which were submitted to management and on which management made written comments. (Hall Deposition [RX 116], June 5, 2001 p 55; CX 27, CX 30, CX 32, CX 33) Dr. Hall reported his concerns about the defects of PINS and about the Lakeside bomb directly to management as well as to the State, and I so find and conclude. (Hall Deposition [RX 116], June 5, 2001 p 97; CX 4, CX 10, CX 34, CX 80, CX 99, CX 108)

In January 1996, Colonel Kiskowski called Dr. Hall into a meeting with Dr. Hall's supervisors. Among other things, at this time the Colonel informed Dr. Hall via "counseling" that Dr. Hall should not be testifying to Congress or to compliance agencies such as the State or EPA, or even to Mr. Skeen's office, the Dugway legal office, about his concerns, at least without going first to his management and giving them the information first. (TR 5889-5890) If Colonel Kiskowski had not known of Dr. Hall's prior protected reporting to Congress, the State environmental agency and others, there would have been no need for the Colonel to conduct this "counseling session." I actually view this "counseling" as the imposition of a gag order.

In this same January, 1996 meeting, Colonel Kiskowski discussed with Dr. Hall and Hall's supervisors the results of Dugway's internal investigation of Hall's internally reported

concerns about the Lakeside Bomb, BZ, and Simpson Butte issues. (TR 5889-5890) This meeting evidences management's clear knowledge of these protected activities of Dr. Hall given that management was requested to investigate them by Dr. Hall, did so, and reported back to Dr. Hall (although a gag order was not the response or relief for which Dr. Hall was looking.)

Dr. Hall happened to overhear one of his managers say on the telephone that Dr. Hall could not be trusted to not report events to the State of Utah, an opinion which showed that Dr. Hall's reporting to the State of Utah was a concern to his managers and, most important, that they knew he was doing it. (Hall Deposition [RX 116], June 5, 2001 p 110-111) The Dugway environmental office knew Hall was reporting to the State (TR 2932 [Moran]), and I so find and conclude.

C. ACTIONS TAKEN BY DUGWAY AGAINST DR. HALL

On the basis of the totality of this closed record, I find and conclude that Dr. Hall was subjected to a number of hostile and adverse actions by Dugway. The more obvious ones included:

*Successful and unsuccessful attempts to lower Dr. Hall's performance ratings and the addition of negative statements to the performance ratings; (Hall Deposition [RX 116], June 5, 2001 p 118-119, 123-124;)

*Reassignment and detailing of Dr. Hall to the Joint Contact Point, also known as the Joint Operations Directorate or JOD. (RX 126) Detailed effective June 10, 1991 from chemist GS-1320-12 Step 5 in Chemical Technology Branch in the Chemical Laboratory Division in the Materiel Test Directorate to the position of Operations Research Analyst GS-1515-12 Step 5 in the Joint Operations Directorate. The Position Number was 03893. The Request for Personnel Action on OPM Standard Form 52-8 stated, "Detail not to exceed one year." Dr Hall, on being detailed to JOD, ostensibly to maximize his chance of promotion, however, was not presented with an adequate job description under the then applicable rules of the Office of Personnel Management, and after arrival at JOD Hall's 1 year detail was changed to 120 days. Dr. Hall, shortly after arriving in JOD, was assigned by Mr. Chinn to learn how to do statistical analyses. Although consistent with a one year or permanent job in JOD, this assignment was inconsistent with a detail of 120 days in that the learning curve detracted from other tasks on which either Mr. Chinn or Directorate Chief Dr. Christiansen wanted Hall to work at a higher priority. Upon precipitous termination of the detail to JOD only days after Hall participated in the late August 1991 Army 15-6 investigation by COL Arthur Kelly of White Sands Missile Range, Hall was not restored to

his normal job in the Chemical Laboratory, but was assigned to work under Mr. Steelman in Test Management Division, where Hall's chances of success would have been poor;

*Imposition of additional tasks on Dr. Hall and then criticizing him for taking time from his initial assignments to work on the new priorities;

*Removal of Dr. Hall's approval in the CPRP program more than once, and once without notice to Dr. Hall. The CPRP is a surety program, not a security clearance technically, but similar to it, that is required for personnel working with chemical warfare agent, and necessary for him to do his job;

*Administrative termination and medical termination/restriction/suspension of Dr. Hall's CPRP approval. Hall was temporarily disqualified 13 June 96 and Administratively terminated 9 July 96. As of June 4, 1996, the Clinic doctor signed off on "no change in PRP status," even after Hall had been carried to Clinic by ambulance for the "dizzy spell." The Dugway form reflecting these events was not given to Hall at the time or pre-trial notwithstanding his attorneys' requests for his files. Hall was medically temporarily disqualified with no notice and no opportunity to have input from his own doctors, followed by administrative removal;

*Prohibiting Dr. Hall from working at home notwithstanding his health problems, while allowing others to do so;

*Suspension of his security clearance;

*Requiring Dr. Hall to undergo two mental health exams in 1989 and another mental health exam in 1996;

*Commander's recommendation to revoke permanently Dr. Hall's security clearance; (TR June 11 p 6-7, 71-77; RX 1, RX 2, RX 3, RX 4; RX 127);

*Negative comments on Dr. Hall's performance evaluations. Even when he managed to persuade his supervisors to maintain an adequate rating on the evaluation, they continued to give him very negative comments on the evaluations;

*Requiring Dr. Hall to undergo a new background investigation and security clearance review in 1995-1996, although the applicable regulation did not require such, and then raising old previously resolved allegations against Dr. Hall in that review;

*Threatened termination of Dr. Hall's employment;

*Imposing impossible standards by a hostile and arrogant technical editor to prevent completion of a technical report so that lateness of the report could be used as a basis to challenge Dr. Hall's performance and threaten Dr. Hall with termination of his employment;

*Biasing the evaluations of mental health professionals by providing negative information regarding Dr. Hall without providing notice to Dr. Hall or an opportunity to rebut same, including negative ratings of work performance inconsistent with and not reflected in Dr. Hall's official performance evaluations;

*Failure to offer Dr. Hall the same accommodations for health problems offered other employees, including Respondent's failure to assist Dr. Hall in filing an FECA claim prior to retirement;

*LTC Kiskowski arranged for a meeting with Hall shortly after Hall encountered Kiskowski in a hallway in Kuddes building on a Thursday and happily told Kiskowski that he was soon to return to work and could crank out the BZ report and help on many other reports. (Hall Deposition [RX 116], June 5, 2001 p 105) Kiskowski's meeting on February 11, 1997 was unpleasant, with Kiskowski expressing anger at Hall. (Hall Deposition [RX 116], June 5, 2001 p 99) After the meeting, Mr. Steelman had Hall sign a memo dated February 10, 1997 which criticized Hall's performance and implied that adverse actions would soon follow if Hall could not work full days and turn out the work;

*Creation of a hostile work environment in an effort to force Dr. Hall's resignation. Expressions of anger and hostility toward Dr. Hall and his protected activities and the actions listed above along with use of slander, innuendo and breaches of privacy and confidence to impugn Dr. Hall's reputation created a hostile work environment that became intolerable;

*A Gag order prohibiting reporting to Congress and environmental agencies at least without first going through the chain-of-command. (TR 5889-5890; TR June 11 p 18-20) Only Dr. Hall received such an instruction personally in a meeting with from Colonel Kiskowski. (TR June 11 p 20)

*Dugway forced Complainant to retire via this hostile work environment and the persistent pattern of adverse actions identified above. (RX 124) Dr. Hall could see the clear handwriting on the wall. He tolerated a number of hostile and adverse actions for almost ten (10) years, was told directly to

stop engaging in reported activity to Congress and the agencies, was threatened with termination, and had his clearance suspended and recommended to be revoked. His doctors advised him that he should take himself out of that hostile environment or face more serious adverse impacts on his mental and physical health. In his own judgment it was clear that he should not wait to be terminated for his health and his professional future. This set of circumstances represents a sufficient factual prerequisite for what is recognized in the law as constructive discharge or, in this case, as a result of Dr. Hall's wise but reluctant decision to mitigate damages, a forced retirement. There was a continuing pattern of repeated protected activities by Complainant and repeated adverse actions in response by the Respondent. The pattern reached a level of a constructive discharge or forced retirement only in the 1996-1997 time frame because of the cumulative effect on Complainant's mental and physical health. Dr. Hall had tolerated this hostility for years, had worked with the State, made some adjustments in his style to become less aboveboard to try to minimize the stress and retaliation but it just came to the point in 1996 and 1997 that it was no longer tolerable, and I so find and conclude.

D. DUGWAY'S MOTIVE AND INTENT IN TAKING ACTIONS AGAINST DR. HALL

On the basis of the totality of this closed record, I find and conclude that the evidence of Dugway's retaliatory motive in Dr. Hall's case is abundant and blatant. As one example, General Aiken called Complainant a traitor in 1990 for reporting environmental and safety violations to the Inspector General and DOD. (TR p 5889-5890 [Hall]) Colonel Kiskowski was present back in those days and overheard General Aiken's remark and later told Dr. Hall in a January, 1996 meeting that Hall's reputation had preceded him and made reference to having heard General Aiken's remark. (**Id.**) On this issue I credit Dr. Hall's credible testimony as to who said what and when.

A Dugway manager, Dr. Condie, in a phone conversation overheard by Dr. Hall, referred to Dr. Hall as one who cannot be trusted to not report his concerns or complaints to the State. (Hall Deposition [RX 116], June 5, 2001 p 110-111) The same manager reported that Dr. Resnick, Condie's supervisor, instructed him to "Turkey farm" Dr. Hall. (TR p 9707 [Condie]) Another manager, Mr. Steelman, testified that Resnick had expressed complaints and hostility towards Dr. Hall to other supervisors and had instructed Condie to "Turkey farm" Dr. Hall to get him out of the way. (TR June 12 p 42 [Steelman])

Another blatant example of direct evidence of Dugway's retaliatory motive is the discussion Dr. Hall had with his supervisor on being immediately transferred out of the Chem lab in 1991 after disclosing to OSHA and the State improper storage of waste chemicals at Dugway. Dugway managers were upset with Dr. Hall because he reported violations concerning improper storage of waste chemicals prompting Col. Ertwine to transfer Dr. Hall out of the chem lab, while candidly explaining to Dr. Hall that the transfer had to be made to appear as if it were not in retaliation for Dr. Hall having reported the violations to OSHA. (CX 63) At that early stage in Dr. Hall's protected activities, Dugway was already conscious of and wary about its potential liability for retaliation against an employee who raised environmental and safety concerns, and I so find and conclude.

One indication of Dugway's retaliatory motive regarding Dr. Hall's whistleblowing can be gleaned from the fact that during the same time frame that Dr. Hall was raising concerns about the presence of mustard agent in the Carr Red Dirt, Ms. Carol Nudell, on behalf of the Army, was attempting to get removed from the public the report that had been created on the Carr Red Dirt issue, a report which showed mustard agent contamination. (Hall Deposition [RX 116], June 5, 2001 p 74-75)

Later in Dr. Hall's career at Dugway, in April 1997, close in time to his protected activities on the BZ, PINS and Simpson Butte issues, Dugway managers, after ordering Dr. Hall to submit to a fitness for duty exam, were informed by Dr. Hall that he was being treated differently than other employees because there was another chemist who had missed much work because of health problems and was not required to submit to such an exam. Dugway managers were not discouraged by this observation and promptly ordered the other chemist to submit to a fitness for duty exam, explaining to the other chemist, Dr. Peter Harvey, that they were requiring him to submit to the exam so as to avoid the appearance of disparate treatment of another employee (whom Dr. Harvey knew to be Dr. Hall). (CX 45, CX 46; TR June 13 p 27-30 [Harvey]) Fortunately, Dr. Harvey maintained notes and records of the conversations at the time. (CX 45, CX 46) This request for a fitness for duty exam imposed first on Dr. Hall was one of the precipitating factors in Dr. Hall finding continued employment at Dugway so intolerable that he felt compelled to retire early, and he gave notice thereof the following month. Clearly the initial notice to Dr. Hall was disparate treatment and the later Dugway attempt to cover up this fact caused a dedicated employee, apparently disabled from his work at Dugway, to be fired and suffer economic loss and psychological distress as well, although Dr. Harvey was assisted in his departure by Dugway to minimize the consequences to him, while Hall was not

given such assistance, and I so find and conclude. (TR June 13 p 30-35 [Harvey])

Perhaps equally disturbing, and during this same critical time frame just prior to Dr. Hall's decision to retire, is the decision by Dugway Commander Colonel Como to recommend revocation of Dr. Hall's security clearance after reviewing a packet of information submitted to him by Mr. Bowcutt for the purpose of informing Colonel Como's decision on Dr. Hall's clearance which packet included, of all things, prominently placed and referenced, Dr. Hall's February, 1997 DOL whistleblower complaint. (TR June 11 p 71-77 [Como]; RX 1, RX 2, RX 3, RX 4) The cover note for the packet directed the Commander's attention to the fact that such a whistleblower complaint had been filed. (**Id.**; RX 4) Colonel Como at trial clearly identified the packet which included Dr. Hall's DOL complaint as the information he read completely and considered in making his decision to recommend revocation of Dr. Hall's security clearance. (TR June 11 p 71-77) This is perhaps one of the most blatant admissions of an employer in a whistleblower case to date, acknowledging, as it does, that one of the key adverse actions contributing to Dr. Hall's forced early retirement was made by Dugway at least in part because Dr. Hall had filed an environmental whistleblower complaint with the DOL pursuant to the federal environmental statute employee protection provisions (which, of course, is itself protected activity).

Colonel Como admitted that he knew Dr. Hall had the right and an opportunity to respond before a final decision was made on his security clearance but Colonel Como recommended revocation of Dr. Hall's clearance without waiting to review Dr. Hall's response. (TR June 11 p 77)

While these circumstances, and the referenced testimony and documents are clear enough, if there was any remaining doubt that Dugway would retaliate against an employee for reporting an environmental violation, one need look no further than Dugway's actions towards Ms. Judy Moran, as reflected in Dugway's own records. Ms. Moran was an environmental compliance officer at Dugway and Dugway records reflect unambiguously that twice Dugway took disciplinary action against Ms. Moran explicitly because she also reported potential environmental violations and dangers to the State. (CX 131; TR 3354-3357; TR 2941-2945; TR 3095) Further, Ms. Moran credibly testified that based on her experience as a Dugway environmental compliance officer, if Dugway thought they would not be caught, they would conceal and not report environmental violations to the State. (TR 2935-2936)

As already noted above, during the January 1996 meeting with

Colonel Kiskowski and Dr. Hall's supervisors, the Colonel informed Dr. Hall via "counseling" that Dr. Hall should not be testifying to Congress or to compliance agencies such as the State or EPA, or even to Mr. Skeen's office, the Dugway legal office, about his concerns, at least without first going to his management and giving them the information. (TR 5889-5890; TR June 11 p 18-20) Dr. Hall took this communication for what it was, **i.e.**, the imposition of a gag order in a hostile work environment. If Colonel Kiskowski had not known of Dr. Hall's prior protected reporting to Congress, the State environmental agency and others or was not concerned about them, there would have been no need for the Colonel to conduct this "counseling session," and I so find and conclude.

The general attitude of Dugway towards employees who report concerns outside the chain-of-command was made clear by General Aiken in a public statement. General Aiken stated in the Dugway newsletter that he had a deep concern with employees who reported concerns to the Inspector General's Office outside their chain-of-command. (CX 59)[3] There was a clearly stated Dugway policy from the top down that required reporting of environment violations and concerns through the "chain-of-command" first, and treated employees who reported environmental concerns outside the chain-of-command to the State, EPA, OSHA, Congress, the IG, or even the Dugway JAG or Environmental Office as disloyal, disobedient and subject to disciplinary action. (TR 2954 [Moran]; TR June 11 p 18-20 [Stansbury]).

There were a number of instances of the use by Dugway of irregular procedures regarding Dr. Hall. One was Dugway's failure to notify Dr. Hall that his CPRP approval has been terminated. Dr. Hall not only was removed from the CPRP Program, the program in which one has to be involved to access areas where chemical warfare agent is present, which access, of course, was necessary for him to do his job, but he was removed from the program without his knowledge. (**Id.**)

Another major example of irregular procedure and disparate treatment involved Dugway requiring Dr. Hall to submit to a new background investigation on the excuse that newly changed regulations required it when in fact the regulation in question exempted Dr. Hall as an employee who had a valid background investigation within five years of having been placed in a chemical duty position and who had no break in federal service. (RX 19) Dugway's own Surety officers called by Dugway to testify confirmed Complainant's reading of the regulation to exempt employees in Dr.

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[3]As also noted above, this is a senior military officer who referred to Dr. Hall as a traitor for his protected activity.

Hall's situation.

Dr. Hall was never informed, and found out for the first time during trial, that his CPRP had been suspended, restricted or terminated for medical reasons.

One of the most offensive actions by Dugway also strongly evinces retaliatory motive. Dugway, after falsely accusing Dr. Hall of sexual harassment during his first few years of employment and protected activity, and even after Dr. Hall was cleared of any wrong-doing and assured in writing by the then Commander Colonel Cox that his record was clear (CX 14), raised the old allegations from earlier years later in 1996 in an attempt to influence adversely the outcome of the third mental exam and adversely affect the outcome of Dr. Hall's CPRP and security clearance review. Dugway continued to pursue unreasonably such unfounded allegations throughout the trial, notwithstanding that no complaining witness could be produced (because there was no sexual harassment to complain of), and notwithstanding a caution from this Administrative Law Judge that the alleged sweater incident was not viewed as an unwarranted touching by the individual. This entire episode will be further discussed below.

Another irregular procedure example is Dugway's failure to erase from Dr. Hall's records the temporary disqualification of Dr. Hall from CPRP after Dr. Hall was reinstated, a failure contrary to Army regulations and policy that require such erasure.

Another prime example of irregular procedure in Dugway's treatment of Dr. Hall was the hastily called meeting by Colonel Kiskowski with Dr. Hall in February, 1997 in which Kiskowski became angry with Hall and threatened termination of Hall's employment. There was a complaint made by the union after that meeting that this was improper procedure by management to have on such short notice a meeting with an employee to discipline the employee. Commanding Colonel Como later wrote a memo directing Dugway managers to cease such conduct and to honor the agreement with the Union to give adequate notice of such meetings. (TR June 11 p 63; CX 11)

Another irregular procedure is evidenced in the attempts by managers at Dugway Proving Ground to provide biased information and to withhold information from the medical doctor doing the third mental examination, Dr. McCann, related to the surety (CPRP)/security clearance review by Dugway of Dr. Hall in order to achieve a predetermined result: a removal of Dr. Hall's security clearance. Dr. Hall was not told what information had and had not been provided to Dr. McCann and was given no opportunity to rebut

it. Interestingly, when questioned closely regarding the nature of the communications and information provided to Dr. McCann by Dugway, Dr. McCann's records came up missing, preventing Complainant even to this day from learning what actually transpired, and I so find and conclude.

In addition, there was disparate treatment in the manner in which the security clearance review was applied, to Complainant's disadvantage. Dr. Hall was told filing his Form 398-2 paperwork was urgent, and he had to fill this information out within a few days. He did so, and then he came to learn later that his colleagues, whom he was told would have to undergo the same procedure, had not been required to fill out those forms and submit to that review in some cases for at least two years afterwards. Thus, the sense of urgency applied only to Dr. Hall, and I so find and conclude.

Notwithstanding having been cleared after two prior mental exams, Dr. Hall was threatened with, and forced to undergo, a third mental exam later in his career as part of his security clearance investigation, notwithstanding the fact that his prior mental exams had been passed successfully, and that no concern about those mental exams had been raised in the intervening years for security clearance purposes. It was only during the last years of his more intense whistle blowing and the Army's more intense retaliation, 1995, 1996 and 1997, that the Army chose to raise from the grave the issue of the mental exams and old long resolved allegations and reinsert them into the new security clearance review, although Colonel Cox, in 1991, had assured Dr. Hall that he had a clean slate at Dugway. (CX 14)

There was disparate treatment of Dr. Hall in regard to being required to submit to mental examinations when employees who had engaged in similar or more serious conduct were not required to submit to such exams.

Irregular procedures and changing reasons for Dugway's actions against Dr. Hall, which evidence retaliatory motive, are reflected in Dugway's conduct in first rating Dr. Hall as fully successful or higher on all of his performance appraisals but then giving contradictory performance information to the mental health professionals examining Dr. Hall, and later at trial attempting to provide an entirely different performance rating for Dr. Hall using a 1-10 comparative or personal potential based system never adopted at Dugway.

Dugway received the notification of the DOL/OSHA investigation on February 24, 1997. The hostile adverse actions continued and

intensified at that point in time, including the Commander's decision to recommend revocation of Hall's security clearance which occurred about 3 weeks later. (TR June 11 p 71-72) Shortly after Dugway received notice of Hall's DOL complaint, Dr. Brimhall handed Hall his review of the BZ report first draft and expressed concern for something unpleasant awaiting Hall at the Editor's office.

The reasons given for his lowered performance evaluations were pretext, they were false and specious, and I so find and conclude. In some cases, Dr. Hall, protesting those lowered evaluations, actually was able to have other managers intervene and have those performance evaluations increased above what the initial management rating was.

Dugway's assertions of poor performance by Dr. Hall due to late reports were pretext because other employees had late reports without receiving threats of termination and in Dr. Hall's case, the lateness was due to the health impacts of Dugway's retaliation on Dr. Hall and orchestrated imposition of performance standards for the BZ report through managers and the technical editor that were impossible to meet, all of which are part of the conspiracy against Dr. Hall by the "team players" at Dugway.

III. ARGUMENT AND DISCUSSION

An important issue in these cases is the credibility of the Complainant and that of his witnesses. Respondent's essential thesis on this issue is that Dr. Hall simply is not credible, that he has changed his version of events over the years, that his witnesses had motives to give biased testimony against the Respondent. As specific examples, Respondent submits that several times Dr. Hall has changed his story; Michael LeFevre, the union official, was biased against Colonel Kiskowski; Tom See is Mr. LeFevre's father-in-law; Dr. Peter Harvey is a friend and colleague of Dr. Hall; Judy Moran is also biased against Respondent because she had also received a letter of reprimand from her supervisor; Gary Bodily offered little evidence of value; Charlie Warr also offered little evidence of value, other than describing Dr. Hall as "flakie"; Mr. Biltoft, as another union official, was also antagonistic toward the Respondent; and Marty Gray, a Utah state employee, was surprised at the amount of personal information Dr. Hall put into his e-mails to him and other Utah employees.

Other examples cited by the Respondent with reference to Dr. Hall are as follows:

Complainant has lied, exaggerated, played word games and

changed his story to prevail in this action. Complainant is an employee who overreacted to the risks posed by test activities at Dugway. Complainant is misguided just like "Chicken Little" - he misunderstood the facts due to paranoid tendencies or just plain lied.

As the hearing proceeded, according to Respondent, it became clear that Complainant had a problem with telling the truth, exaggerating and distorting events, experienced memory loss and lied about the facts, according to Respondent, who has also accused Complainant's counsel of changing his arguments several times during the course of the hearing. Respondent also posits that Dr Hall has exaggerated the importance of the Simpson Butte Demilitarization Site - as can be seen in his memo (CX 77), Respondent describing Complainant's selective memory as his main problem.

Respondent also suggests that some employees understandably tried to avoid Complainant due to his personality and behavior, but such avoidance or shunning was not due to his whistleblowing.

I disagree very strongly.

This Administrative Law Judge, allowing for the usual hyperbole found in an attorney's brief, simply cannot believe that counsel truly believes those statements. This is akin to saying, "everyone else is correct, only the whistleblower is wrong."

Respondent also submits that Complainant is arrogant and abrasive and cannot get along with his co-workers - -

I disagree as he is very intelligent, dedicated and conscientious individual. However, such arrogance can be attributed to Ms. Christina Wheeler, Dugway's Technical Editor, and her arrogance was manifested in her testimony before me, as even a cursory reading of her testimony will reflect that aspect of her personality - - it's quite obvious that she took pleasure in criticizing and humiliating and deprecating the work of Ph.D. chemists. That Ms. Wheeler may have treated others in that fashion is no defense herein, as it is apparent that she also was out to get Dr. Hall.

Complainant's co-workers went out of their way to make his life at Dugway as miserable as possible simply because he was not a "team player." While the term "team player" has a positive connotation in sports, it is a pejorative team in referring to one who has engaged in protected activities, and I so find and conclude.

While Respondent's counsel refers to Complainant as being a perjurer, I strongly disagree. I observed Complainant's demeanor during fifty-seven (57) days of trial and I have credited his testimony, and any confusion as to dates or events can simply be attributed to the passage of time. Fortunately, Dr. Hall kept good notes as to who said what and when, and even tape recorded certain conversations that put those conversations into proper perspective. Here I refer specifically to the tape of Dr. Hall's evening telephone talk with Ms. Deanna Dalton Carlson, a friend to this date, notwithstanding the actions and pressures of certain at Dugway to drag her into that conspiracy against Dr. Hall. Ms. Carlson is the other individual in the so-called sweater incident.

A. BURDEN OF PROOF

The burden of proof in whistleblower cases has been well described in prior decisions of the OALJ and ARB. As I wrote in one of my more recent decisions:

> In order to establish a **prima facie** case of unlawful discrimination, a complainant must show that he engaged in protected activity, that he was subjected to adverse action, and that the respondent was aware of the protected activity when it took the adverse action. A complainant also must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. **Dartey v. Zack Co.**, Case No. 80-ERA-2, Sec. Dec., Apr. 25, 1983. Viewing all of the evidence as a whole, the Complainant has shown, by a preponderance of the evidence, that she was discriminated against for engaging in protected activity. **See Boudrie v. Commonwealth Edison Co.**, 1995-ERA-15 (ARB Apr. 22, 1997); **Boytin v. Pennsylvania Power & Light Co.**, 1994-ERA-32 (Sec'y Oct. 20, 1995); **Marien v. Northeast Nuclear Energy Co.**, 1993-ERA-49/50 (Sec'y Sept. 18, 1995). To carry that burden Complainant must prove that Respondent's stated reasons for reprimanding Complainant are pretext, **i.e.**, that they are not the true reasons for the adverse action and that the protected activity was. **Leveille v. New York Air Nat'l Guard**, 1994-TSC-3/4 (Sec'y Dec. 1, 1995); **Hoffman v. Bossert**, 1994-CAA-4 (Sec'y 19, 1995).

Migliore v. Rhode Island Department of Environmental Management, 1998-SWD-3, 1999-SWD-1, 1999-SWD-2 (ALJ RDO August 13, 1999).

As I also wrote in another decision:

In order for [Complainant] Anderson to prevail, she must establish the following:

...

B. That she was engaged in a protected activity.

C. That she was discriminated against or received disparate treatment by Metro.

D. That Metro knew of the protected activity when it took the adverse action.

E. The protected activity was the reason for the adverse action.

See Trimmer v. U.S. Dept. of Labor, 174 F.3d 1098, 1101 (10th Cir. 1999); **Carrol v. U.S. Dept. of Labor**, 78 F.3d 352, 356 (8th Cir. 1996); **Simon v. Simmons Foods, Inc.**, 49 F.3d 386, 388 (8th Cir. 1995).

The traditional preponderance of evidence standard is to be used in complaints under environmental whistleblower statutes. **See Martin v. Dept. of the Army**, ARB No. 96-131 at 6 (July 30, 1999) and **Ewald v. Commonwealth of Virginia**, Case No. 89-SDW-1 at 11 (April 20, 1995).

Once a complainant has proved all the elements of the **prima facie** case by a preponderance, the respondent may rebut the **prima facie** case by presenting evidence that it had a legitimate non-discriminatory motive for the action taken. **See Carroll v. Bechtel Power Corp.**, 91-ERA-46 (Sec'y February 15, 1995)(setting out the general legal framework) "In any event, the complainant bears the ultimate burden of proving by a preponderance of the evidence that he was retaliated against in violation of the law. (**Id.**) and **Agbe v. Texas Southern University**, ARB No. 98-072 (July 27, 1999)(respondent does not carry the burden of proving a negative proposition, that it was not motivated by complainant's protected activities when it took the adverse action. Throughout, complainant has the burden of proving that the employer was motivated, at least in part, by complainant's protected activities). Once the respondent produces evidence that the complainant was subjected to the adverse action for legitimate non-discriminatory reasons, the rebuttable presumption created by complainant's **prima facie** showing drops from the case. **Carroll** at 6.

> There is one variant to this format. Where an employee establishes by a preponderance that illegitimate reasons played a part in the employer's adverse action, the employer has the burden of proving by a preponderance that it would have taken the adverse action against the person for the legitimate reason alone. (**Id.**) This is known as a dual motive case. If there is rebuttal, the complainant, to prevail, must demonstrate that the proffered reason for the adverse action is not the real reason by showing that discriminatory reasons more likely motivated the action or that the proffered explanation is unworthy of credence. **Texas Dept. of Comm. Affairs v. Burdine**, 450 U.S. 248, 256 (1981); If the trier of fact decides there are dual motives, the respondent cannot prevail unless it shows it would have reached the same decision in the absence of protected conduct. **Young v. CBI Services, Inc.,** 88-ERA-8 (Sec'y Dec. 8, 1992), slip op. at 6.

Anderson v. Metro Wastewater Reclamation District, ARB No.: 98-087, Case No.: 1997-SDW-7 (ALJ RDO Sept. 18, 2001).

B. DR. HALL IS AN EMPLOYEE COVERED UNDER, AND DUGWAY IS AN EMPLOYER COVERED UNDER, THE FEDERAL ENVIRONMENTAL STATUTES' EMPLOYEE PROTECTION PROVISIONS, THAT IS, THE DEPARTMENT OF LABOR HAS JURISDICTION OVER THE COMPLAINTS FILED BY DR. HALL, AND DR. HALL ENGAGED IN PROTECTED ACTIVITIES UNDER THESE STATUTES

1. Sovereign Immunity Has Been Waived under All but One of the Applicable Federal Statutes

Respondent appears to concede that the Resource Conservation and Recovery Act (RCRA) and the act which it amended, the Solid Waste Disposal Act (SWDA), apply here and that the Army is not immune from actions under those acts, including under the employee protection provisions. The case law and the Federal Facilities Compliance Act at 42 U.S.C. 6961 make this clear. The case law, including decisions by the ARB, one of which is quoted below, also makes clear that several other federal environmental statutes at issue here also contain an explicit waiver of sovereign immunity (all but TSCA).

Jurisdiction Over a Federal Government Entity

On the basis of our review of pertinent law, I find and conclude that this forum does have jurisdiction over a federal government entity and that Respondent is covered by and subject to all but one of the statutes before me. As I wrote in one of my decisions:

> As an entity of the United States government, the Academy cannot be held liable unless the United States has waived its sovereign immunity under the statutory provisions at issue. Any waiver of the government's sovereign immunity must be "unequivocal." **United States Dep't of Energy v. State of Ohio**, 503 U.S. 607, 615 (1992). We examine whether the United States has waived its sovereign immunity concerning the five whistleblower provisions under which Berkman brought his complaints. This examination is important because the remedies available under the different environmental statutes are not uniform. **Berkman v. USCGA**, ARB Nos. 97-CAA-2, 97-CAA-9 (January 2, 1998)(a matter over which this Administrative Law Judge presided).

(a) Comprehensive Environmental Response, Compensation and Liability Act

The United States unequivocally has waived its sovereign immunity under the CERCLA's whistleblower provision. **Marcus v. U.S. Environmental Protection Agency**, Case No. 92-TSC-5, Sec. Dec. and Ord., Feb. 7, 1994, slip op. at 2-3; **accord Pogue v. U.S. Dep't of Navy Mare Island Shipyard**, Case No. 87-ERA-21, Sec. Dec., May 10, 1990, slip op. at 4-12, **rev'd on other grounds sub nom. Pogue v. Dep't of Labor**, 940 F.2d 1287 (9th Cir. 1990).

(b) Clean Water Act (CWA)

The whistleblower provision of the WPCA can apply to the Federal government if the respondent Federal entity falls within the "federal facilities" provision of that Act, which provides:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and

comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.

33 U.S.C. §1323 (1994). Thus, the United States unequivocally has waived sovereign immunity under the WPCA.

(c) Clean Air Act (CAA)

The CAA has a similar Federal facilities provision at 42 U.S.C. §7418(a) (1994). The legislative history clearly indicates that the CAA whistleblower provision applies to facilities of the United States: "This section is applicable, of course, to Federal . . . employees to the same extent as any employee of a private employer." H.R. Rep. No. 294, 95th Cong., 1st Sess. 326, **reprinted in** 1977 U.S. Code Cong. & Admin. News 1405. **See Jenkins v. U.S. Environmental Protection Agency**, Case No. 92-CAA-6, Sec. Dec. and Ord., May 18, 1994, slip op. at 5.

(d) Solid Waste Disposal Act

With reference to the SWDA, its Federal facilities provision applies to any Federal agency "having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste." 42 U.S.C. §6961 (1994). The Secretary has found that the SWDA whistleblower provision applies to all entities of the United States government by means of the Federal facilities provision. **Jenkins**, slip op. at 7.

(e) Toxic Substances Control Act

In contrast, the United States has not waived its sovereign immunity under the TSCA's employee protection provision, except for certain whistleblower complaints involving lead- based paint. **Stephenson v. NASA**, Case No. 94-TSC-5, Sec. Dec. and Ord. Of Rem., July 3, 1995, slip op. at 6-8; **accord Johnson v. Oak Ridge Operations Office, United States Dep't of Energy**, ARB Case No. 97-057, ALJ Case Nos. 95-CAA-20, -21, -22, Final Dec. and Ord., Sept. 30, 1999, slip op. at 9.

Berkman v. U.S. Coast Guard Academy, Case Nos.: 97-CAA-2 and

97-CAA-9 (ARB Dec. January 2, 1998)(a matter over which this Administrative Law Judge presided).

(f) Resource Conservation and Recovery Act (RCRA) a/k/a Solid Waste Disposal Act

Dugway argues that Dr. Hall's discrimination case should be dismissed in its entirety due to lack of jurisdiction under RCRA. I disagree as the record is replete with evidence of Dr. Hall's protected activities under RCRA. Dugway does not deny that it had a RCRA hazardous waste permit. (TR June 12 p 21) Dugway managers, in addition to Dr. Hall, testified that RCRA issues were involved with the weapons, waste and contaminated sites that were the subject of Dr. Hall's protected activities, as did Ms. Moran. For example, the lab chemicals improperly disposed of down the lab drains until Dr. Hall and the State stopped the practice were RCRA wastes. (Hall Deposition [RX 116] June 5, 2001 p 21-22; TR June 11 p 142-43; TR June 12 p 30, 120, 121) The agents themselves and agent contaminated wastes involved in the Carr Red Dirt, Simpson Butte and the mustard/Lewisite training sites are RCRA wastes. (TR p 2933) The munitions to be assessed via the PINS device are RCRA wastes as evidenced by the State's treatment of the Lakeside bomb being transported without a hazardous waste manifest. It also does not take a psychic or regulatory expert to understand that cyanide compounds such as Dr. Hall determined was in the M-79 mystery bomb, much to the surprise of Dugway, are hazardous wastes regulated under RCRA either specifically under regulations or under the statutory definition or the imminent hazard provision.

The Lewisite (because of its arsenic content) and the mustard agent contaminants found at the Simpson Butte site, the Carr Red Dirt Site, and the mustard/Lewisite mine testing site are RCRA regulated wastes, and would also be subject to enforcement under RCRA's imminent and substantial endangerment provisions. (TR 2960 [Moran regarding Carr Red Dirt being RCRA issue]; 40 C.F.R. part 261; 42 U.S.C. §§ 6972(a)(1)(B), 6973)

The BZ bomblets were also RCRA regulated hazardous wastes at a minimum because of the reactive-explosive-ignitable components of the bomblets, as distinguished from the BZ agent itself which Dugway and apparently the State treated as not being a RCRA hazardous waste. (TR 2826 [Dugway counsel admission that most chemical agents are regulated as hazardous waste in Utah except BZ]; TR p 2953-2954 [Moran, same])

The PINS device was being relied on by Dugway to identify whether or not certain munitions contained chemical warfare agent

waste, and chemical warfare agent waste is RCRA regulated waste (P999 and F999 RCRA waste codes in Utah). (TR 2826 [Dugway counsel admission that most chemical agents are regulated as hazardous waste in Utah except BZ]; TR p 2953-2954 [Moran, same])

Dugway has an inaccurately narrow view of the reach of RCRA. For example, the imminent and substantial endangerment citizen and EPA enforcement provisions in RCRA are broad indeed. **See**, 42 U.S.C. §§ 6972(a)(1)(B) and 6973. The Resource Conservation and Recovery Act (RCRA), via the citizen suit provision and a companion provision for EPA enforcement, prohibits the handling of solid or hazardous waste in a manner that contributes to the creation of an imminent and substantial endangerment to the public or the environment (an imminent hazard). (**Id.**)

The standard for determining and "imminent and substantial endangerment" pursuant to RCRA is clearly and plainly stated in the language of the statute. RCRA provides the following standard in its citizen suit provision:

> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf --
> (1) . . .
> (B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contribution to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which **<u>may</u> present an imminent and substantial endangerment to health or the environment.**

42 U.S.C. §6972(a)(1)(B) (emphasis added)

RCRA's imminent hazard provisions do not put an unreasonable burden of proof on EPA or citizens to prove harm with certainty. Only threatened harm is required, not actual harm, in order to support a claim of imminent endangerment under RCRA, either 42 U.S.C. §6972(a)(1)(B) (citizen plaintiff) or 42 U.S.C. §6973 (government plaintiff). **Reserve Mining Company v. EPA**, 514 F.2d 492, 519 (8th Cir. 1975); **United States v. Vertac**, 489 F.Supp. 870, 880-81 (E.D. Ark. 1980); **United States v. Price**, 688 F.2d 204, 213 (3d Cir. 1982); **United States v. Waste Industries, Inc.**, 734 F.2d 159, 166 (4th Cir. 1984).

Under the imminent hazard provisions, the courts have the authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes. **Price**, 688 F.2d at 213-14; **Middlesex County Board of Chosen Freeholders v. New Jersey**, 645 F.Supp. 715, 722 (D.N.J. 1986); **United States v. Ottati & Goss, Inc.**, 630 F.Supp. 1361, 1393 (D.N.H. 1985).

The Solid Waste Disposal Act, also known as RCRA, is prospective act designed primarily to prevent improper disposal of hazardous wastes in the future. **Waste Industries**, 734 F.2d at 166; H.R. Committee Print No. 96-IFC, 96th Cong., 1st Sess. at 32 (1979) ("the Eckhardt Report").

The RCRA imminent hazard provision is not specifically limited to emergency-type situations. **Waste Industries**, 734 F.2d at 165. A finding of "Imminency" does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present: An "imminent hazard" may be declared at any point in a chain of events which may ultimately result in harm to the public. **Environmental Defense Fund v. Environmental Protection Agency**, 465 F.2d 528, 535 (D.C. Cir. 1972); **Ottati & Goss**, 630 F.Supp. at 1394.

A finding that an activity may present an imminent and substantial endangerment does not require actual harm. **United States v. Waste Industries, Inc.**, 734 F.2d 159 (4th Cir. 1984) "Endangerment" means a threatened or potential harm and does not require proof of actual harm. **Ottati & Goss**, 630 F.Supp at 1394; **United States v. Vertac Chemical Corp.**, 489 F.Supp. 870, 885 (E.D. Ark. 1980); **Ethyl Corp. v. EPA**, 541 F.2d 1, 13 (D.C. Cir.) (**en banc**), **cert denied**, 426 U.S. 9041, 96 S.Ct. 2662, 49 L.Ed 2d 394 (1976); **Dague v. City of Burlington**, 935 F.2d 1343, 1355-1356 (2d Cir. 1991), **rev'd on other grounds**, 112 S.Ct. 2638 (1992); **Gache v. Town of Harrison**, 1993 WL 30476, *6(S.D.N.Y. 1993).

By enacting the endangerment provisions of RCRA and [Safe Drinking Water Act], Congress sought to invoke the broad and flexible equity powers of the federal courts in instances where hazardous wastes threatened human health. S.Rep.No. 96-172, 96th Cong. 1st Sess, at 5, reprinted in, (1980) U.S. Code Gong. & Ad. News 5019, 5023. These provisions have enhanced the courts' traditional equitable powers by authorizing the issuance of injunctions when there is but a risk of harm, a more lenient standard than the traditional requirement of threatened reparable harm. H.R.Rep.No. 96-191, 96th Cong., 1st Sess., at 45 (1979); H.R.Re.No. 93-1185 93rd Cong., 2nd Sess., reprinted in (1974) U.S. Code Cong. & Ad. News 6454, 6488. **United States v. Price**, 688 F.2d

204, 211 (3d Cir. 1982).

The unequivocal statutory language and the legislative history make it clear that congress intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes. **Price**, 688 F.2d at 213-214. Congress, in the endangerment provisions of RCRA sought to invoke nothing less than the full equity powers of the federal courts in the effort to protect public health, the environment, and public water supplies from the pernicious effects of toxic wastes. **Price**, 688 F.2d at 214.

Congress in amending RCRA in 1984 recognized and affirmed the **Price** court's interpretation of the broad equitable powers provided by the Act. H.R.Rep. No. 98-198, 98th Cong., 2d Sess., at 48 (1984), reprinted in, 1984 U.S. Code Cong. & Ad. News 5576, 5607. In light of this broad RCRA authority to address not only releases of hazardous waste but the potential release of hazardous or solid waste that ay pose a risk of harm, and given that an employee does not have to be substantively correct regarding the perceived violation to be protected, there can be little doubt that Dr. Hall's internal and external reports regarding uncontrolled waste sites containing chemical warfare agents and/or their byproducts, concerning inadequate tests for declaring agent contaminated items clean and agent free before they are discarded or reused, concerning failure to properly identify the chemical contents of old recovered munitions which may due to that error be treated or handled in a dangerous manner (**e.g.** with incompatible chemicals), to name a few, fall under the jurisdiction of the DOL via the employee protection provision of RCRA, and I so find and conclude.

2. No Military Exemption Applies

Dugway relies on the Administrative Procedure Act (APA), 5 U.S.C.. Section 554, and on the Supreme Court decision in **Department of Navy v. Egan**, 484 U.S. 518 (1988) in asserting its position that military affairs matters, including security clearance decisions, are exempt from review by DOL and the courts under the federal environmental statutes. However, the Supreme Court's decision in **Egan** relates only to limits of judicial review on the merits or substance of security clearance decisions in a specific context, and does not establish a broad military affairs exemption. **Egan** concerned the authority of the MSPB to determine the **substantive correctness of a security clearance decision in the context of merit system law that is more narrow than the environmental statutes in question in the instant case**. Unlike in **Egan**, under the environmental statutes there is a broad grant of

authority for the DOL and the courts to review any form of discrimination, not just a finite list of narrowly defined adverse actions. **Egan** does not stand for the proposition that the DOL in an environmental whistleblower case cannot determine whether a decision regarding a security clearance was made with an illegal discriminatory motive as indicated by, for example, direct evidence of retaliatory motive such as the agency basing the security clearance decision in whole or part on an employee having filed a whistleblower complaint with the DOL or by indirect circumstantial evidence such as use of irregular procedure and disparate treatment. The application of **Egan** depends on, **inter alia**, what type of action is to be challenged, and what type of relief is sought.

Notwithstanding **Egan**, an act of suspending a security clearance and a notice to remove that clearance can still be **prima facie** evidence of retaliatory motive and a challengeable adverse action under the environmental statutes. Even if the remedy is not available of undoing a security clearance decision on its substantive merits, **per se**, the circumstances surrounding the decision can nonetheless be taken as evidence of retaliatory motive and an adverse action under the environmental statutes via, for example, use of irregular procedure or disparate treatment.

Whether the DOL and courts in environmental discrimination cases can dictate a change in the substance of a security clearance decision, if illegal discriminatory intent is shown to have infected the decision process, appears to not have been specifically decided and settled by the courts. But there is long standing Supreme Court precedent establishing the strong presumption that judicial review of agency action will be available and establishing the availability of judicial review of an illegal decision process even where the law would otherwise clearly prohibit review of the substance or merits of the decision. **See, e.g.**, **Bowen v. Michigan Academy Family Physicians**, 476 U.S. 667 (1986).

As the U.S. Supreme Court held:

> We begin with the strong presumption that Congress intends judicial review of administrative action. From the beginning "our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." **Abbott Laboratories v. Gardner**, 387 U.S. 136, 140 (1967) (citing cases). **See generally** L. Jaffe, Judicial Control of Administrative Action 339-353 (1965). In **Marbury v.**

Madison, 1 Cranch 137, 163 (1803), a case itself involving review of executive action, Chief Justice Marshall insisted that "[the] very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws." Later, in the lesser known but nonetheless important case of **United States v. Nourse**, 9 Pet. 8, 28-29 (1835), the Chief Justice noted the traditional observance of this right and laid the foundation for the modern presumption of judicial review:

"It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to the debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States."

Committees of both Houses of Congress have endorsed this view. In undertaking the comprehensive rethinking of the place of administrative agencies in a regime of separate and divided powers that culminated in the passage of the Administrative Procedure Act (APA), 5 U. S. C. §§ 551-559, 701-706, the Senate Committee on the Judiciary remarked:

"Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board." S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945).

Accord, H. R. Rep. No. 1980, 79th Cong., 2d Sess., 41 (1946). The Committee on the Judiciary of the House of Representatives agreed that Congress ordinarily intends that there be judicial review, and emphasized the clarity with which a contrary intent must be expressed:

"The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill

> a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." **Ibid.**
>
> Taking up the language in the House Committee Report, Justice Harlan reaffirmed the Court's holding in **Rusk v. Cort**, 369 U.S. 367, 379-380 (1962), that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." **Abbott Laboratories v. Gardner**, 387 U.S., at 141 (citations omitted). This standard has been invoked time and again when considering whether the Secretary has discharged "the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of his decision," **Dunlop v. Bachowski**, 421 U.S. 560, 567 (1975). ...
>
> We ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.

Id.

In view of the foregoing, it is apparent that there is no law that prohibits the DOL and courts from reviewing the process used in the security clearance decision for evidence of retaliation and, if found, providing some remedy to the complainant, even if the remedy may have to be limited to matters other than controlling the substantive outcome of the clearance decision.[4] In any case, there is no authority that prohibits consideration of an illegal and retaliatory clearance decision process for the purpose of establishing the elements of a whistleblower case such as protected activity, retaliatory motive, adverse action, and management knowledge of the action (versus who does and does not get a clearance). There is nothing in **Egan** that exempts the Army from compliance with federal environmental laws or authorizes the Army to use security clearances to retaliate against employees who raise environmental and safety concerns. First Amendment concerns would be raised by any attempt to "legalize" such discrimination for raising concerns on matters of public import such as the improper handling of chemical warfare agents, and I so find and conclude.

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[4]This issue is not present in the case at bar because Dr. Hall, as further discussed below, does not seek reinstatement.

Further, in regard to potential application of any APA exemption for military affairs via 5 U.S.C. Section 554, assuming DOL proceedings under the environmental statutes are the type of proceeding to which such APA language was intended to apply, there is nothing uniquely military that is deserving of protection from judicial or agency review involved in a military agency functioning as an employer and illegally creating a hostile work environment, issuing improper ratings on performance evaluations, directly expressing hostility towards a Complainant's protected activities, issuing gag orders to prevent employees from engaging in protected activity, and so forth. These types of conduct, even though they happen to occur at a military facility, do not involve national security issues or uniquely military functions, **i.e.**, do not represent "the conduct of military or foreign affairs functions" as that phrase is used in 5 U.S.C. Section 554, and I so find and conclude.

Further, the APA provision at 5 U.S.C. Section 554 merely makes inapplicable the APA in the case of "the conduct of military or foreign affairs functions" but does not restrict application of later enacted environmental statutes and the regulations thereunder to environmental whistleblower cases involving military agency employers. The Congress clearly intended for the military to be bound by the federal environmental laws and the state environmental laws, like any other polluter. Congress made that very clear in the Federal Facility Compliance Act at 42 U.S.C. 6961, as one example, and I so find and conclude.

It should be noted that in **Johnson v. Oak Ridge**, ARB. 97-057, September 30, 1999 the ARB appeared to decide, at least by implication, that security clearance issues could be addressed in an environmental whistleblower case if the clearance issue was clearly the subject of protected activities under the environmental statutes (which was found not to be the case there).

3. Complainant Engaged in Protected Activities, and Did So with a Reasonable Good Faith Belief That Environmental Laws Were Violated

This case proceeded to a full hearing on the merits. Accordingly, examining whether or not Complainant has established a **prima facie** case is no longer particularly useful and this Administrative Law Judge will consider whether, viewing all of the evidence as a whole, the Complainant has shown, by a preponderance of the evidence that he was discriminated against for engaging in protected activity. **See Boudrie v. Commonwealth Edison Co.**, 1995-ERA-15 (ARB Apr. 22, 1997); **Boytin v. Pennsylvania Power & Light**

Co., 1994-ERA-32 (Sec'y, Oct. 20, 1995); **Marien v. Northeast Nuclear Energy Co.**, 1993-ERA-49/50 (Sec'y, Sept. 18, 1995). To carry that burden Complainant must prove that Respondent's stated reasons for reprimanding Complainant are pretext, **i.e.**, that they are not the true reasons for the adverse action and that the protected activity was. **Leveille v. New York Air Nat'l Guard**, 1994-TSC-3/4 (Sec'y Dec. 1, 1995); **Hoffman v. Bossert**, 1994-CAA-4 (Sec'y 19, 1995). It is not sufficient that Complainant establish that the proffered reason was unbelievable; he must establish intentional discrimination in order to prevail. **Leveille, supra**.

On the basis of the totality of this closed record, I find and conclude that Complainant's engagement in protected activity has been overwhelmingly established in this case. He raised complaints both internally within his chain-of-command, and externally to third parties.[5] I found Complainant's testimony most credible and convincing on this issue. Specifically, I find that, virtually from the start of his employment with Dugway, Complainant has repeatedly raised his concerns both internally and to the Utah agency. Complainant's concerns were that the procedures, methods, and policies of Dugway were causing direct violations of pertinent statutes and regulations. I find and conclude that these actions constitute protected activity under the several Acts before me, with the exception of TSCA.

Similarly, the evidence clearly establishes that Respondent knew of Complainant's engaging in these protected activities, as his complaints were always logged with his first line supervisor and elsewhere in his chain-of-command.

Even though Respondent disagreed with Complainant's insistence about the proper procedures, Respondent has not shown that Complainant's position was unreasonable. **See generally Yellow Freight Sys. v. Reich**, 38 F.3d 76 (2d Cir. 1994) (wherein the Court held an employee need not prove the existence of an actual safety defect to have engaged in protected activity under an analogous whistleblower statute, the Surface Transportation Act); **Crow v. Noble Roman's, Inc.**, 1995-CAA-8 (Sec'y Feb. 26, 1996) (the CAA protects employee's work refusal that is based on a good faith, reasonable belief that doing the work would be unsafe or unhealthy); **Minard v. Nerco Delamar Co.**, 1992- SWD-1 (Sec'y Jan. 25, 1994) (concluding that whistleblower protection applies to where a complainant is mistaken, so long as complainant's belief is

[5]The law is clear that both internal and external complaints are protected by the whistleblower statutes. **See Dodd v. Polysar Latex**, 1988-SWD-4 (Sec'y Sept. 22, 1994).

reasonable); **Scerbo v. Consolidated Edison Co. of N.Y., Inc.**, 1989-CAA-2 (Sec'y Nov. 13, 1992) (protection is not dependent upon actually proving a violation). In fact, it is well established that Complainant arrived at his recommendations that the Respondent was violating the Acts based on his extensive training and experience. Further, the evidence establishes that many of the issues in controversy were anything but clear cut.

The nature of Dr. Hall's protected activities has been detailed above in the findings of fact and these are incorporated herein at this point. Moreover, the law defining what is protected activity, as described below, clearly encompasses Dr. Hall's actions described above in raising his environmental concerns internally and externally. Dr. Hall's actions in raising RCRA, CERCLA, SDWA, CWA, and CAA concerns regarding Simpson Butte and Lewisite, the mustard agent in the Carr Red Dirt, the Lakeside Bomb and M79 mystery bomb, the BZ bomblets, the improperly stored waste chemicals and a number of other matters spelled out **supra**, are classic protected activities, and I again so find and conclude.

> The Secretary of Labor has repeatedly held that the reporting of safety or quality concerns internally to one's employer is protected activity under the Solid Waste Disposal Act. **See Dodd v. Polysar Latex**, 1988-SWD-4 (Sec'y Sept. 22, 1994); **Conaway v. Instant Oil Change, Inc.**, 1991-SWD-4 (Sec'y Jan. 5, 1993). The Secretary has noted that, "An employee's internal complaints are the first step in achieving the statutory goal of promoting safety." **Dodd v. Polysar Latex**, 1988-SWD-4 (Sec'y Sept. 22, 1994).

Migliore v. Rhode Island Department of Environmental Management, 1998-SWD-3, 1999-SWD-1, 1999-SWD-2 (ALJ RDO August 13, 1999).

> Courts and the Secretary of Labor have broadly construed the range of employee conduct which is protected by the employee protection provisions contained in environmental and nuclear acts. **See** S. Kohn, **The Whistleblower Handbook** 35-47 (1990). Examples of the types of employee conduct which the Secretary of Labor has held to be protected include: making internal complaints to management,[3] reporting alleged violations to governmental authorities such as the Nuclear Regulatory Commission ("NRC") and the Environmental Protection Agency, threatening or stating an intention to report alleged violations to such governmental authorities, and contacting the media, trade unions, and citizen intervenor groups about alleged violations. **Id.**

As I also wrote in another decision:

> This claim deals with internal complaints to Respondent's management because on April 20, 1992, Complainant advised Lionel Banda that there were serious and widespread violations in Respondent's "Access Screening Program" for technicians granted unescorted access to nuclear power plants and other public utilities. The totality of this closed record leads to the conclusion that Complainant reported these violations to the Employer and that he forced the Employer to report these violations to the appropriate governmental authority, such as the NRC, as well as the affected public utilities.

Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 (ALJ Sept. 1, 1994) (a matter over which this Administrative Law Judge presided).

As I also wrote in another decision:

> The employee protection provisions have been construed broadly to afford protection for participation in activities in furtherance of the statutory objectives. **Marcus v. U.S. Environmental Protection Agency**, 1996-CAA-3 (ALJ Dec. 15, 1998), slip op. at p. 25, **citing Tyndall v. U.S. Environmental Protection Agency**, 93-CAA-6, 95-CAA-5, ARB June 14, 1996). Protected activities include employee complaints which "are grounded in conditions constituting reasonably perceived violations of environmental acts." **Jones v. ED&G Defense Materials., Inc.**,95-CAA-3 (ARB Sept. 29, 1998), slip op. at p. 8, **citing Crosby v. Hughes Aircraft Co.**, Case No. 85-TSC-2, Sec. Final Dec. and Ord., Aug. 17, 1993, slip op. at 26, **aff'd, Crosby v. United States Dep't of Labor,** 1995 U.S. LEXIS 9164(9th Cir.); **Johnson v. Old Dominion Security**, Case Nos. 86-CAA-3, et seq., Sec. Final Dec. and Ord., May 29, 1991, slip op. at 15. Raising internal concerns to an employer, as well as the filing of formal complaints with external entities, constitute protected activities under §24.1(a). **Melendez v. Exxon Chemicals Americas**, ARB No. 96-051, ALJ No. 1993-ERA-6 (ARB July 14, 2000), slip op. at p. 10.
>
> Raising complaints about worker health and safety "constitutes activity protected by the environmental acts when such complaints touch on the concerns for the environment and public health and safety that are

addressed by those statutes." **Melendez v. Exxon Chemicals Americas, supra** at p. 10. **See also Jones v. ED&G Defense Materials, Inc.**, **supra** at p. 8, **citing Scerbo v. Consolidated Edison Co.**, Case No. 86-ERA-2, Sec. Dec. and Ord., Nov. 13, 1992, slip op. at 4-5. Further, the gathering of evidence in support of a whistleblower complaint, including the gathering of evidence by means of tape recording, is a type of activity that has been held to be covered by the employee protection provisions referenced at 29 C.F.R. §24.1(a). **Melendez v. Chemicals Americas, supra** at p. 10.

Anderson v. Metro Wastewater Reclamation District, ARB No.: 98-087, Case No.: 1997-SDW-7 (ALJ RDO Sept. 18, 2001) (a matter over which I presided).

As I also wrote more recently:

> Complainant's engagement in protected activity has been overwhelmingly established in this case. She raised complaints both internally within her chain-of-command, and externally to the EPA. I found Complainant's testimony most credible and convincing on this issue. Specifically, I find that from the 1996 proposed reorganization to the present, Complainant has repeatedly raised her concerns that RIDEM was taking action that compromised the RCRA enforcement program. Complainant's concerns were that the procedures, methods, and policies of RIDEM were causing direct violations of the RCRA. I find and conclude that these actions constitute protected activity under.
>
> Even though Respondent disagreed with Complainant's insistence about the proper RCRA procedures, Respondent has not shown that Complainant's position was unreasonable. **See generally Yellow Freight Sys. v. Reich**, 38 F.3d 76 (2d Cir. 1994) (wherein the Court held an employee need not prove the existence of an actual safety defect to have engaged in protected activity under an analogous whistleblower statute, the Surface Transportation Act); **Crow v. Noble Roman's, Inc.**, 1995-CAA-8 (Sec'y Feb. 26, 1996) (the CAA protects employee's work refusal that is based on a good faith, reasonable belief that doing the work would be unsafe or unhealthy); **Minard v. Nerco Delamar Co.**, 1992- SWD-1 (Sec'y Jan. 25, 1994) (concluding that whistleblower protection applies to a case where a complainant is mistaken, so long as complainant's belief is reasonable);

> **Scerbo v. Consolidated Edison Co. of N.Y., Inc.**, 1989-CAA-2 (Sec'y Nov. 13, 1992) (protection is not dependent upon actually proving a violation). In fact, it is well established that Complainant arrived at her recommendations that the Respondent was violating the RCRA based on her extensive training and experience in the environmental enforcement area. Further, the evidence establishes that many of the enforcement actions in controversy were anything but clear cut.

Migliore v. Rhode Island Department of Environmental Management, 1998-SWD-3, 1999-SWD-1, 1999-SWD-2 (ALJ RDO August 13, 1999).

The **Kemp** case requirement, **see Kemp v. Volunteers of America of Pennsylvania, Inc.**, ARB No. 00-069, ALJ No. 2000-CAA-6 (ARB Dec. 18, 2000), that Complainant have a reasonable good faith belief that environmental laws were violated is well satisfied here. The asbestos in the basement circumstances in **Kemp** are facts that do not resemble the facts here which involve, **inter alia**, chemical warfare agent having been disposed of in the open environment at the Simpson Butte, Carr Red Dirt, and mustard/Lewisite mine test sites, incompatible chemicals stored so as to create a risk of fire and explosion, chemicals dumped via drains into sewers and from there to unlined lagoons, and violations of RCRA that do not require a release to constitute a violation (such as the RCRA requirement to prevent releases, **see** 40 C.F.R. Sections 264.15, 264.31; Section 270.30) to name a few examples of many identified in the findings of fact above and established in the record. Further, it was clear that because of the volatile nature of the chemical agents and the limited air flow control in the Dugway Chem Lab that the State environmental agency considered a release of even a small amount of agent inside the Chem Lab building to be a release to the environment, and I so find and conclude. (Hall Deposition [RX 116], June 5, 2001 p 25-26)

C. THE EMPLOYER DUGWAY PROVING GROUND HAD KNOWLEDGE OF DR. HALL'S PROTECTED ACTIVITIES

The record is replete with evidence that Dugway knew of Dr. Hall's protected activities and numerous examples of such evidence have already been detailed above. Dugway knew because Dr. Hall made many of his protected reports directly to his managers and higher level supervisors, as in **Berkman**.

As I wrote in **Berkman**:

> Similarly, the evidence clearly establishes that

> Respondent knew of Complainant's engaging in these protected activities, as his complaints were always logged with his first line supervisor and elsewhere in his chain-of-command.

Berkman v. U.S. Coast Guard Academy, Case Nos.: 97-CAA-2 and 97-CAA-9 (ARB Dec. January 2, 1998). As the findings of fact, **supra**, make clear, there was virtually no example of Dr. Hall's protected activities of which Dugway was unaware.

I strongly disagree with Respondent that Dugway was aware of Complainant's protected activities only "a few times." This record is replete with many instances thereof, almost from the start of his employment at Dugway, simply because the word quickly spread that he was not a "team player" and could not be trusted. Complainant would later even be called "traitor" by a very high ranking military officer.

D. ADVERSE ACTIONS WERE TAKEN BY RESPONDENT EMPLOYER DUGWAY PROVING GROUND AGAINST DR. HALL

It is clear from the applicable law discussed herein defining what constitutes adverse actions by an employer against an employee that are actionable under the environmental statutes if performed with discriminatory intent, that the numerous actions by Dugway against Dr. Hall documented in the record and delineated above are the type of actions that are within the scope of the employee protection provisions of RCRA, SDWA, CWA, CERCLA and the CAA.

> An "adverse action" has been defined as simply something unpleasant, detrimental, even unfortunate, but not necessarily (and not usually) discriminatory." **Marcus v. U.S. Environmental Protection Agency**, 1996-CAA-3 (ALJ Dec. 15, 1998), slip op. at p. 28, **citing Stone & Webster Engineering Corp. v. Herman**, 115 F.3d 1568, 1573 (11th Cir. 1997). Under 29 C.F.R. §24.2(b), as amended, an employer is deemed to have violated the particular statutes and regulations "if such employer intimidates, threatens, restrains, coerces, blacklists, discharges or in any other manner discriminates against any employee" because of protected activities. Consistent with this regulation, a wide range of unfavorable actions has been held to constitute adverse action within the context of employment discrimination complaints. **Melendez v. Exxon Chemicals Americas, supra** at 24.

Anderson v. Metro Wastewater Reclamation District, ARB No.: 98-087,

Case No.: 1997-SDW-7 (ALJ RDO Sept. 18, 2001).

> Discrimination means disparate treatment. It means treating one employee less favorably than another for a forbidden reason. **See Teamsters v. United States**, 431 U.S. 324, 335 n. 15 (1977). An employer may treat one employee less favorably than another in many different ways. Any such less favorable treatment is adverse action. Termination, suspension and discipline are obvious forms of adverse action, but they are not exclusive. Indeed, the seminal case establishing the model for proving discrimination, **McDonnell Douglas v. Green**, involved none of those.

Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 (ALJ Sept. 1, 1994).

> An adverse employment action can be in the form of tangible job detriment or a hostile work environment. **Smith v. Esicorp, Inc.**, 93-ERA-16, at p. 3 (Sec'y 3/13/96). ... Complainant also alleges he has been subjected to retaliatory harassment, which is a violation of the applicable whistleblower statutes. **Smith**, **supra**, at p. 11; **Marien**, **supra**, at p. 4. Hostile work environment cases involve issues of the environment in which the employee works and not tangible job detriment. **Smith**, **supra**, at p. 11. For harassment to be actionable, it must be sufficiently severe or persuasive as to alter the conditions of employment and create an abusive working environment. **Id.** at pp. 4-5 (**Citing Meritor Savings Bank v. Vinson**, 477 U.S. 57, 67 (1986). **See also English v. General Elec. Co.**, 85-ERA-2 (Sec'y 2/13/92) (in which the Secretary applied the **Meritor** decision for guidance in the case of an alleged hostile work environment in violation of an analogous whistleblower statute, the ERA). In **Harris v. Forklift Sys., Inc.**, 114 S. Ct. 367 (1993), the Supreme Court discussed some of the factors that may be weighed but emphasized that whether an environment is hostile or abusive can be determined only by looking at all the circumstances.

Berkman v. U.S. Coast Guard Academy, Case Nos.: 97-CAA-2 and 97-CAA-9 (ARB Dec. January 2, 1998).

> A finding of constructive discharge requires proving that the employer, rather than acting directly, deliberately makes an employee's working conditions so difficult, unpleasant, unattractive, or unsafe that an objective

reasonable person would have felt compelled to resign, **i.e.**, that the resignation was involuntary. **See generally Mosley v. Carolina Power & Light Co.**, 94-ERA-23 (ARB 8/23/96)(**citing Nathaniel, supra; Johnson v. Old Dominion Security**, 86-CAA-3 (Secy' 5/29/91). **See also Guice-Mills v. Derwinski**, 772 F.Supp. 188 (S.D.N.Y. 1991), **aff'd**, 967 F.2d 794 (2d Cir. 1992); **Lopez v. S.B. Thomas, Inc.**, 831 F.2d 1184 (2d Cir. 1987); **Talbert, supra**. Thus, the adverse consequences flowing from an adverse employment action generally are insufficient to substantiate a finding of constructive discharge. Rather, the presence of "aggravating factors" is required. **Nathaniel, supra (citing Clark v. Marsh**, 665 F.2d 1168, 1174 (D.C. Cir. 1981). **See also Stetson v. Nynex Serv. Co.**, 995 F.2d 355 (2d Cir. 1993). Conceivably, a constructive discharge could occur through medical or physical inability. **Spence v. Maryland Casualty Co.**, 803 F.Supp. 659, 667 (W.D.N.Y. 1992)(reasoning that **Lopez v. S.B. Thomas, Inc., Supra**, does not require that a constructive discharge be demonstrated only by an affirmative resignation).

On the one hand, the Secretary has noted that circumstances sufficient to render a resignation involuntary include a pattern of discriminatory treatment and "locking" an employee into a position from which no relief seemingly can be obtained. **Johnson, supra**, at n. 11 (**citing Clark**, 665 F.2d at 1175); **Satterwhite v. Smith**, 744 F.2d at 1382-1383). On the other hand, it is insufficient that the employee simply feels that the quality of his work has been unfairly criticized. **Mosley, supra** (**citing Stetson**, 995 F.2d at 360). Furthermore, when an employee's performance is poor, "an employer's communication of the risks [of discipline for that poor performance] does not spoil the employee's decision to avoid those risks by quitting." **Id.** at p. 4 (**quoting Henn v. National Geographic Society**, 819 F.2d 824, 829-30 (7th Cir. 1987), **cert. denied**, 484 U.S. 964 (1987). ...

The Secretary has adopted the majority position for determining whether or not there has been a constructive discharge. As was succinctly stated in the matter of **Hollis v. Double DD Truck Lines, Inc.**, 84-STA-13, at p. 4 (Sec'y March 18, 1995) it is not necessary to show that the employer intended to force a resignation, only that he intended the employee to work in the intolerable

conditions.

Berkman v. U.S. Coast Guard Academy, Case Nos.: 97-CAA-2 and 97-CAA-9 (ARB Dec. January 2, 1998).

There can be no doubt on this record that Dugway took a number of adverse actions against Dr. Hall. The more obvious ones included lowered performance ratings, negative statements in performance ratings, transfer to the JOD from the chem lab, a twelve month transfer thereafter reduced to 120 days, removal of Dr. Hall's approval in the CPRP program, suspension and recommended revocation of his security clearance, creation of a hostile work environment, three mental examinations, threatened discharge, and constructive discharge/forced retirement, all of which adverse actions have been discussed above.

Dr. Hall also faced direct expressions of anger and hostility because of his protected activities. The hostile work environment included the actions listed above and use of slander, innuendo and breaches of privacy and confidence to impugn Dr. Hall's reputation. Complainant was forced to retire. He was facing some pretty clear handwriting on the wall. He tolerated a number of hostile and adverse actions over a period of years, and was told directly to stop engaging in protected reporting activity to Congress and environmental agencies. His CPRP had been removed without notice and finally his security clearance had been suspended and recommended to be revoked. He had been threatened with termination if his performance appraisals did not improve and circumstances made it clear that what Dugway wanted to change was not Dr. Hall's actual job performance but his protected reporting of environmental violations and dangers. This was something in good conscience Dr. Hall would not allow himself to be intimidated into doing. At that point, with his mental and physical health in jeopardy he decided to cut his losses and mitigate his damages and try to maintain some aspect of his health and his income by retiring. He consulted his doctors, who essentially advised him that this hostile environment was probably going to kill him, and his own judgment was that he should not wait to be terminated for his own professional future. So, in May of 1997, Dr. Hall was forced to give his notice, and in June of 1997 actually did in fact retire. This pattern of facts, which made continued employment intolerable to Dr. Hall and would have to any reasonable person, amounts to what is recognized in the law as constructive discharge, or in this case, a forced retirement, as described in the case law quoted **supra**, and I so find and conclude.

Respondent submits that its actions of requiring Dr. Hall to go through the chain-of-command with his concerns or complaints

were not adverse actions under the statutes involved herein. However, I strongly disagree - - that is the very essence of his case as the chain-of-command requirement was being used to prevent Dr. Hall from voicing his concerns or complaints outside Dugway.

E. RESPONDENT ACTED WITH RETALIATORY MOTIVE, TAKING ACTIONS AGAINST DR. HALL BECAUSE HE ENGAGED IN PROTECTED ACTIVITIES

The trial record reflects evidence of retaliatory motive that is both abundant and blatant, and these have been detailed above. This evidence falls into a number of categories of direct and circumstantial evidence that are recognized in the case law as indicia of retaliatory motive and discriminatory intent. Some of the applicable case law which lays out the law on evidence of retaliatory motive, including the burden shifting procedure which is to be used in an appropriate case is quoted at some length below. However, the findings above make it clear that Dr. Hall's case is a direct evidence case, as in **Moder** quoted below, and thus burden shifting is not required. In any case, the motive evidence documented in the findings above makes clear that even if a burden shifting analysis were applied here, at best for Dugway this is a dual motive case and with the direct evidence identified in the findings above, there is no way Dugway can separate out the illegal from the legal motives for its actions against Dr. Hall and show that it would have taken the same actions absent the illegal motive, and I so find and conclude.

> A plaintiff may prove a case of unlawful whistleblower retaliation in the same way as a case under Title VII of the Civil Rights Act of 1964. He may do so in one of two ways: either directly with direct evidence of retaliation or indirectly through circumstantial evidence establishing a **prima facie** case of retaliation.

Moder v. Village of Jackson, Wisconsin, 2000-WPC-0005 (ALJ Aug. 10, 2001) (a matter over which this Administrative Law Judge presided).

It is now well-settled that the Complainant, applying the traditional "burden-shifting" approach established in **McDonnell Douglas v. Green**, 411 U.S. 492 (1973), may establish a **prima facie** case of retaliation indirectly by showing that

> (1) the plaintiff was an employee of the party charged with discrimination; (2) the plaintiff was engaged in a protected activity under the Clean Water Act; (3) the employer took an adverse action against the plaintiff;

> and (4) the evidence creates a reasonable inference that the adverse action was taken because of the plaintiff's participation in the statutorily protected activity.
>
> **Passaic Valley**, 992 F.2d at 480-81; **see also Simon v. Simmons Foods, Inc.**, 49 F.3d 386, 389 (8th Cir. 1995).

Moreover, once the employee establishes a **prima facie** case of discrimination through such indirect means, the burden shifts to the employer to "produce evidence that the plaintiff was [denied a promotion] . . . for a legitimate, nondiscriminatory reason." **See Texas Dept. of Community Affairs v. Burdine**, 450 U.S. 248, 254 (1981). The employee then has "the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." **Id.** at 253; **see also St. Mary's Honor Center v. Hicks**, 509 U.S. 502, 507-08 (1993). This Administrative Law Judge, in determining whether the plaintiff has met this burden, "may still consider the evidence establishing the plaintiff's **prima facie** case 'and inferences properly drawn therefrom ... on the issue of whether the defendant's explanation is pretextual.'" **Reeves v. Sanderson Plumbing Products, Inc.**, 120 S.Ct. 2097, 2106 (2000) (**quoting Burdine**, 450 U.S. at 255, n. 10).

Furthermore, the plaintiff need not proffer direct evidence that unlawful discrimination was the real motivation. Instead, "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." **Reeves**, 120 S.Ct. at 2108. As the Court stated in **St. Mary's** and reiterated in **Reeves**:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the **prima facie** case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.

St. Mary's, 509 U.S. at 511, **quoted in Reeves**, 120 S.Ct. at 2108. **Id.**

If the employee presents direct evidence of discrimination, there is no need to resort to "burden-shifting" analysis under **McDonnell Douglas v. Green, supra**; **TWA v. Thurston**, 469 U.S. 111, 121 (1985). Direct evidence of discrimination is:

> evidence which, if believed by the trier of fact, will prove the particular fact in question without reliance on inference or presumption... This evidence must not only speak directly to the issue of discriminatory intent, it must also relate to the specific employment decision in question.

Pitasi v. Gartner Group, Inc., 184 F.3d 709, 714 (7th Cir. 1999) (internal quotations and citations omitted).

Of course, the employee must still prove by a preponderance of the evidence that unlawful discrimination was a **substantial factor in the employer's decision. See Price Waterhouse v. Hopkins**, 490 U.S. 228, 259 (1989) (White, J., concurring); **Id.** at 274 (O'Connor, J., concurring); **Texas Dept. of Community Affairs v. Burdine**, 450 U.S. 248, 253 (1981). So long as the direct evidence of discrimination is substantial, the employee is entitled to have it weighed and decided by the trier of fact. ...

This is a direct-evidence case, with substantial evidence that both "speak[s] directly to the issue of discriminatory intent" and "relate[s] to the specific employment decision in question." No inference or presumption is needed. **See Pitasi**, 184 F.3d at 714. Beaver's and Murphy's statements and actions leading up to the decision to promote Deitsch rather than Moder leave no room for doubt that Moder's involvement in the DNR investigation more than ten years before was the deciding factor, and I so find and conclude. ...

As I wrote in **Moder**:

> The Village has asserted what it calls "legitimate, nondiscriminatory reasons" for selecting Deitsch rather than Moder. In this regard, **see McDonnell Douglas v. Green**, **supra,** and its progeny. However, to the extent that those purported reasons are asserted in contravention of the direct evidence of discrimination, it is not enough for the employer simply to articulate them. If an employee proves unlawful discriminatory or retaliation, but the employer contends that its adverse action against the employee was motivated instead by a legitimate, non-discriminatory reason, dual-motive analysis applies. The employer must prove, by a preponderance of the evidence, that it would have reached the same decision even if the employee had not engaged in protected conduct. **See Mt. Healthy City Bd. of Ed. v. Doyle**, 429 U.S. 274, 287 (1977); **Passaic Valley, 992 F.2d**

at 481 (Sec. 507(a) case); see also Price Waterhouse, 490 U.S. at 252-53 (Brennan, J., for 4 justices); **Id.** at 259-60 (White, J., concurring); **Id.** at 261 (O'Connor, J., concurring).

In such a "dual-motive" situation, it is not enough that the employer simply articulate a lawful reason for the employee then to disprove. **See Martin v. Department of the Army**, 93-SDW-1 (Sec'y July 13, 1995). Rather, "the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another." **Price Waterhouse**, 490 U.S. at 245 (Brennan, J.). The employer bears the risk that the influence of legal and illegal motives cannot be separated. **Mandreger v. Detroit Edison Co.,** 88-ERA-17 (Sec'y March 30, 1994).

In short, Moder has proven by direct evidence that unlawful discrimination in violation of Section 507(a) was a substantial motivating factor in the decision not to promote him to supervisor/foreman, and I so find and conclude. The Village bears the burden of proving, by a preponderance of the evidence, that it would have selected Deitsch anyway for legitimate, nondiscriminatory reasons even if it had not also been motivated by Moder's role in the DNR investigation. For the reasons discussed more fully below, all such asserted reasons are mere pretexts. ...

The defendant, of course, is entitled to proffer a "legitimate, nondiscriminatory reason," returning to the plaintiff "the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." **Burdine**, 450 U.S. at 253. Pretext is "a lie, specifically a phony reason for some action." **Russell v. Acme-Evans Co.**, 51 F.3d 64, 68 (7th Cir. 1995).

A plaintiff can establish pretext either directly, with evidence suggesting that retaliation or discrimination was the most likely motive for the termination, or indirectly, by showing that the employer's proffered reason was not worthy of belief. The indirect method requires some showing that (1) the defendant's explanation has no basis in fact, or (2) the explanation was not the "real reason", or (3) ... the reason stated

was insufficient to warrant the termination.

Sanchez v. Henderson, 188 F.3d 740, 746 (7th Cir. 1999) (internal citations and quotations omitted).

Furthermore, the Supreme Court has emphasized:

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the **prima facie** case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.

Reeves, 120 S.Ct. at 2108; **St. Mary's v. Hicks**, 509 U.S. at 511.

Id.

In Dr. Hall's case like Moder's, there was retaliatory motive on the part of the Respondent in taking the adverse actions against Dr. Hall, **i.e.**, the actions taken were caused by the protected activity. There are a number of pieces of the puzzle, key circumstantial evidence, that point clearly to the presence of retaliatory motive in this case. In addition, unlike many whistle blower cases but like **Moder**, there are also more direct expressions of hostility and retaliatory motive in this case which are unambiguous, and I so find and conclude.

Direct Evidence: Respondent's Hostile Attitude Toward Complainant's Protected Activities Specifically:

As this Administrative Law Judge found in **Moder**, this case involves direct evidence of retaliatory motive and discriminatory intent.

This is a direct evidence case. Beaver told Deitsch at Deitsch's interview about "perceived baggage" and the possibility that one or both would be rejected because of the Schultz affair ten years earlier. Murphy told Goetsch, a week before the Board met to make the selection, that Moder was not seen as a "team player" because he had gone to DNR about Schultz. Beaver and Murphy collaborated in placing the report of the anonymous tip to the DNR before the Board members when

> they made their decision. This is all direct evidence that the two key players in the selection decision, Beaver and Murphy, did not want Moder to get the job because of his role in the DNR investigation.

(**Id.**) In the case at bar, General Aiken calling Complainant a traitor for reporting environmental violations is an example of direct evidence of retaliatory motive. There were also several occasions when Colonel Kiskowski expressed overt hostility and anger in meetings with Dr. Hall, including in January 1996 when he imposed the chain-of-command gag order and in February 1997 when he angrily threatened Hall with termination.

Another example of direct evidence is when Dugway manager Dr. Condie referred to Dr. Hall as one who cannot be trusted to not report his concerns and complaints to the State environmental agency.

A further unambiguous piece of direct evidence of retaliatory motive is reflected in the events and conversations resulting from Dugway managers being so upset with Dr. Hall having reported violations concerning improper storage of waste chemicals that Colonel Ertwine felt compelled to transfer Dr. Hall out of the chem lab and candidly explaining that the transfer had to be made to appear as if it were not in retaliation for Dr. Hall having reported the violations to OSHA.

Another blatant example of direct evidence is when Dugway managers, after ordering Dr. Hall to submit to a fitness for duty exam, and after being informed by Dr. Hall that he was being treated differently than other another chemist, promptly ordered the other chemist, Dr. Harvey, to submit to a fitness for duty exam and explained to Dr. Harvey that they were requiring that he submit to the exam so as to avoid the appearance of disparate treatment of the first chemist [Dr. Hall].

No less blatant was Dugway Commander Colonel Como’s decision to recommend revocation of Dr. Hall’s security clearance after reviewing a packet of information submitted to him by Mr. Bowcutt, a packet which included Dr. Hall’s DOL whistleblower complaint, with the cover note for the packet directing the Commander’s attention to the fact that such a whistleblower complaint had been filed just several weeks earlier.

Respondent’s Hostile Attitude Toward Protected Activities of Employees Generally:

One of the more striking pieces of evidence showing Dugway management's hostility toward employees who raise compliance issues is the Dugway file on Judy Moran, formerly an environmental compliance officer at Dugway. Dugway officials suspended the security clearance of environmental compliance officer Judy Moran's after she reported potential violations to the State of Utah, and blatantly stated in the official memoranda reflecting their decision that they did so **because** she reported an environmental violation to the State. **See** CX 131.

A similarly blatant statement by General Aiken was published in a Dugway newsletter in which the General stated that he had a deep concern with employees who reported concerns to the Inspector General's Office outside their chain-of-command. **See** CX 59. Further, there was a clearly stated Dugway policy that required reporting of environmental violations and concerns through the "chain-of-command" first, and treated employees who reported environmental concerns outside the chain-of-command to the State, EPA, OSHA, Congress, the IG, or even the Dugway JAG or Environmental Office as disloyal, disobedient and subject to disciplinary action. This policy and practice, and General Aiken's statement referenced immediately above, reflect clear evidence of hostility and retaliatory motive towards employees such as Dr. Hall who raise protected environmental concerns to State and federal environmental agencies and Congress. Direct evidence of discriminatory intent is found where, as here, an employee is subjected to adverse actions because he went outside the chain-of-command to report an environmental concern.

On the basis of the totality of this closed record, this Judge finds and concludes that Respondent's adverse actions were motivated by its disapproval of Complainant's repeated insistence on environmental compliance and his efforts to obtain that compliance. While this Judge does not fault the chain-of-command for its disagreement with Complainant's assessment on the reportability of the North Site and its declination to adopt his recommendations, I do find fault in the chain-of-command's active efforts to dissuade and/or prohibit Complainant from making a report to external regulatory authorities. Respondent was not entitled to insist that Complainant adhere to their position or keep silent about his disagreement with it. **See Generally Dutkiewicz v. Clean Harbors Environmental Services, Inc.**, 95-STA-34 (ARB August 8, 1997)(a matter over which I presided).

As I wrote in an earlier decision:

> Respondent is, in effect, faulting Complainant for going outside the chain-of-command and making a complaint

> to a government agency. For example, Captain Florin commented and gesticulated that Complainant had stabbed him in the back when he reported to the CT DEP despite the command's determination that the North Site need not be reported. He also testified and attested to the fact that he took issue with Complainant circumventing the chain-of-command. (TR 1003; CX 109) It is not permissible, however, to find fault with an employee for failing to observe established channels when making safety complaints. **Odom v. Anchor Lithkemko**, 96-WPC-1 (ARB 10/10/97). **See also West v. Systems Applications Int'l**, 94-CAA-15 (Sec'y 4/19/95). Such restrictions on communication, the Secretary has held, would seriously undermine the purpose of the environmental whistleblower laws to protect public health and safety.

Berkman v. U.S. Coast Guard Academy, Case Nos.: 97-CAA-2 and 97-CAA-9 (ARB Dec. January 2, 1998).

> The Board has held that evidence that an employer routinely encouraged employees to make written reports of safety defects is "highly relevant" evidence that militates against a finding of retaliatory motive. **See Andreae v. Dry Ice, Inc**. 95-STA-24 (ARB 7/17/97). Vice versa, this Judge views evidence that an employer discourages reporting compliance issues as highly relevant to a finding of retaliatory motive. In this regard, I find the credible and uncontroverted evidence that Attorney Frey was told not to contact the DEP indicative of Respondent's animus towards the environmental compliance officer resorting to external authorities in an effort to obtain compliance. ...

Id.

Respondent's Use of Irregular Procedure in Regard to Complainant:

It is now well-settled that an employer's use of irregular procedure in dealing with an employee who has engaged in protected activities is indicative of retaliatory motive. A number of instances of Dugway's use of irregular procedure in regard to Dr. Hall have been delineated above, especially Dugway's failure to notify Dr. Hall that his CPRP approval was terminated.

It was also irregular procedure to require Dr. Hall to submit to a new background investigation on the excuse that newly changed regulations required it when the regulation in question exempted

Dr. Hall as an employee who had a valid background investigation within five years of having been placed in a chemical duty position and who had no break in federal service. Failure to inform Dr. Hall that his CPRP had been suspended, restricted or terminated for medical reasons was also irregular procedure. Re-raising years later in 1996, old allegations regarding which Dr. Hall had been cleared in 1989-91, particularly in light of Dr. Hall having been given a memo from the Commanding Colonel of Dugway assuring him that his record was clear (CX 14) and that nothing would be held against him in the future, in an attempt to influence adversely the outcome of the third mental exam and Dr. Hall's CPRP and security clearance review was blatantly irregular procedure, not to mention offensive. Likewise failing to erase from Dr. Hall's records the temporary disqualification from CPRP after Dr. Hall was reinstated, contrary to Army regulations and policy that requires such erasure, was irregular procedure reflecting Dugway's discriminatory intent, and I so find and conclude.

Respondent's Disparate Treatment of Complainant:

There was disparate treatment of Dr. Hall regarding his working at home and regarding being subjected to a fitness for duty exam in comparison to Dr. Harvey who was similarly situated. When Dr. Hall pointed this out to Dugway, rather than cease their discriminatory treatment of Dr. Hall evidenced by the disparate treatment, Dugway embarked on a course to coverup the appearance of disparate treatment by forcing Dr. Harvey, a kind and dedicated public servant suffering serious illness, to undergo a fitness for duty exam (although with more flexible procedures) and eventually terminated Dr. Harvey. This intentional victimization of an innocent and loyal professional employee shows the lengths to which Dugway was willing to go to silence Dr. Hall's whistleblowing, and I so find and conclude.

Dr. Hall also suffered disparate treatment regarding the time period in which submission of the paperwork for the new 1995 background investigation for CPRP was required. Dr. Hall was required to submit his paperwork within a short time, a matter of several days, and some of his colleagues were allowed to take 1-2 years to do so. Dr. Hall was also subjected to disparate treatment in regard to being required to submit to mental examinations when employees who were in similar or more compelling circumstances were not required to submit to such exams, and I so find and conclude.

Respondent's Changing Reasons Offered for its Actions Regarding Complainant:

Dugway's stated reasons for actions against Dr. Hall were conveniently inconsistent. Respondent first attempted to rely on a sexual harassment charge as a basis for requiring Dr. Hall to submit to two mental exams in 1989 and then assured Dr. Hall that such an allegation was not the reason for the exam (stating that the actual reason was certain letters Dr. Hall had submitted to Mr. Bowcutt), then in 1991 assured Dr. Hall that there were no pending sexual harassment charges against him, then five and six years later raised the same old (and still unfounded) sexual harassment charge again during later attempts in 1996 to again require Dr. Hall to submit to yet another mental exam, and then at trial attempted to rely on the same old sexual harassment charge to justify its past actions against Complainant but failed to produce a complaining witness even after being cautioned by the Court that the individual allegedly being harassed did not view it as such. Moreover, Ms. Carlson's statements about the sweater incident do not, in my judgment, constitute sexual harassment as she did not view it as an "unwanted touching." However, the woman in the back seat viewed it as such and led the conspiracy to bring that charge against Dr. Hall.

Further, Respondent rated Dr. Hall as fully successful or higher on all of his performance appraisals but gave contradictory performance information to the mental health professionals examining Dr. Hall, and later at trial attempted to provide an entirely different performance rating for Dr. Hall using a 1-10 comparative or personal potential based system never adopted at Dugway.

Proximity in Time of Respondent's Actions to Complainant's Protected Activities

As I wrote in one of my earlier decisions:

> One factor that courts deem important in determining whether the employee has made a **prima facie** case of unlawful retaliation or discrimination is whether the employer discharged or otherwise disciplined the employee for engaging in protected activity "so closely in time as to justify an inference of retaliatory motive." **Couty v. Dole**, 886 F.2d 147, 148 (8th Cir. 1989) (termination occurred thirty days after protected activity), **citing Womack v. Munson** 619 F.2d 1292. 1296 (8th Cir. 1980) (twenty-three days), **cert. denied**, 450 U.S. 979 (1981); **Keys v. Lutheran Family and Children Services of Missouri**, 668 F.2d 356, 358 (8th Cir. 1981) (less than two months). These cases provide examples of when the

> duration of time between protected conduct and adverse employment action is sufficiently short to give rise to at least an inference of retaliation, thereby allowing the employee to satisfy the requirement of a **prima facie** case. ...
>
> It is well-settled that temporal proximity is sufficient as a matter of law to establish the final required element of a **prima facie** case - that of causation of retaliatory discharge. **Keys v. Lutheran Family and Children's Services of Missouri**, 668 F.2d 356, 358 (8th Cir. 1981); **Womack v. Musen**, 618 F.2d 1292, 1286 & N. 6 (8th Cir. 1980); **cert. denied**, 450 U.S. 979, 101 S.Ct 1513, 67 L.Ed 2nd 814 (1981); **Davis v. State University of New York**, 802 F.2d 638, 642 (2d Cir. 1986); **Mitchell v. Baldrich**, 759 F.2d 80, 86 (D.C. Cir. 1985); **Dominic v. Consolidated Edison Co. of New York**, 822 F.2d 1249 (2d Cir. 1987) (considering retaliatory action claim for firing that occurred three months after filing complaint); **Burrows v. Chemed Corp**., 567 F. Supp. 978, 986 (E.D. Mo. 1983) (holding inference of retaliatory motive justified, where transfer followed protected activity); **Kellin v. ACF Industries**, 671 F.2d 279 (8th Cir. 1982) (holding lower court's finding that **prima facie** case for retaliatory action was established, where EEOC charge was filed in late 1971 and disciplinary measures occurred throughout 1972). 8. The close proximity of time of the discharge to the protected activity will justify the inference of a retaliatory motive in the employer. **Couty v. Dole**, **supra** (8th Cir. 1989). The above cases include temporal spacing between the protected activity and the retaliatory discharge of up to five months. **Thermidor, supra.**

Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 (ALJ Sept. 1, 1994).

The close proximity in time between Dr. Hall's protected activities and Dugway's actions strongly supports an inference of retaliatory motive even in the absence of the direct evidence and abundant other circumstantial evidence. For example, reassignment of Dr. Hall to the joint Contact Point occurred shortly after Dr. Hall's reporting to the State and OSHA of improper storage of waste chemicals resulted in an OSHA inspection and citation of Dugway for OSHA violations.

Attempts to lower Dr. Hall's performance appraisal occurred

shortly after Dr. Hall engaged in protected internal and external reporting of environmental concerns, including in 1987 after Hall disclosed potential violations of the Safe Drinking Water Act and Clean Water, and later when Dr. Hall was engaged in raising concerns regarding Simpson Butte, the Carr Red Dirt, the BZ Bomblets, and PINS in the 1995-1997 period.

The Dugway Commander's Recommendation to revoke Dr. Hall's security clearance came shortly after Dr. Hall filed his DOL whistleblower complaint in this matter and after the Commander reviewed that complaint in the packet of information submitted to him and on which he relied in making his determination to recommend revocation of Dr. Hall's security clearance.

About a week after Dr. Hall had submitted his testimony in an Army 15-6 investigation, Dr. Christiansen said Gary Bodily's recently vacated position would not be filled from the list of previous applicants, on which list Hall was highly ranked, but would be filled from outside.

Dugway received the notification of the DOL/OSHA investigation on February 24, 1997. The hostile adverse actions continued and intensified at that point in time. Shortly after Dugway learned of Dr. Hall's complaint, Dr. Brimhall handed Hall his review of the BZ report first draft, and expressed sincere concern for something unpleasant awaiting Hall at the Editor's office.

Dugway's initiation of the third mental exam and expanded DIS investigation came in close proximity to Hall's raising concerns about the Lakeside Bomb, PINS, Simpson Butte, the BZ Bomblets and the Carr Red Dirt.

Pretextual Reasons Offered by Respondent for Its Actions Against Complainant

As Complainant has proved the elements of his case, Respondents have the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. **See Morris v. The American Inspection Co.**, 1992-ERA-5 (Sec'y Dec. 15, 1992). Significantly, Respondent bears only a burden of production, as the ultimate burden of persuasion of the existence of intentional discrimination rests with the Complainant. **Texas Dep't of Community Affairs v. Burdine**, 450 U.S. 248, 254-55 (1981); **Dartey v. Zack Co. of Chicago**, 1982-ERA-2 (Sec'y Apr. 25, 1983). An employer's discharge decision is not unlawful even if based on mistaken conclusions about the facts,

however, a decision will only violate the Acts if it was motivated by retaliation. **Dysert v. Westinghouse Electric Corp.**, 1986- ERA-39 (Sec'y Oct. 30, 1991).

Respondent contends that any alleged, adverse action taken against Complainant was for a legitimate, non-discriminatory reason. I disagree. Rather, I find and conclude that all of Respondent's purported legitimate, non-discriminatory reasons for its actions were actually based upon, and closely interwoven with, Complainant's protected activities, and those actions and reasons therefore have been delineated at length above. While Respondent cites to Dr. Hall's alleged poor performance, the delays and conflicts upon which Respondent relies actually involved the same projects and situations where Dr. Hall was engaging in protected activity. Moreover, the cited delays were actually the result of the conspiracy against Dr. Hall to get rid of him because he was not a "team player" and because of his protected activity.

I find this situation closely analogous to **Passaic Valley Sewerage Commissioners v. United States Dep't of Labor**, 992 F.2d 474 (3d Cir.), **cert. denied**, 50 U.S. 964 (1993), where the Third Circuit held, where there was "no evidence that the Complainant's alleged personality or professional deficiencies [in interpersonal relations] arose in any other context outside his complaint activity," the Respondent's conclusion that the Complainant had a personality problem or deficiency of interpersonal skills was reducible in essence to the problems of the inconvenience the Complainant caused by his pattern of complaints. **Id.** at 481; **see also Dodd v. Polysar Latex**, 1988-SWD-4 (Sec'y Sept. 22, 1994) (concluding that what respondent viewed as poor attitude was nothing more than the result and manifestation of the Complainant's protected activity). I agree that this case presents a situation where all of Respondent's alleged "legitimate" reasons are essentially complaints about the inconvenience and difficulties caused by Complainant raising safety concerns. Therefore, I find and conclude that Respondent has failed to produce a legitimate, non-discriminatory reason for subjecting the Complainant to adverse action, and as a result, Complainant has met his claim for intentional discrimination and is entitled to damages. If, however, a reviewing authority concludes that Respondent has provided legitimate, non-discriminatory reasons for its actions, then I find and conclude that Complainant has proven that any such reasons are pretext, as shall now be discussed.

I find and conclude that Complainant has presented adequate evidence to prove not only that the Respondent's proffered reasons for any adverse action pretext, but also that the Complainant was harassed and subject to disciplinary action in retaliation for

engaging in protected activity. **Leveille v. New York Air Nat'l Guard**, 1994-TSC-3/4 (Sec'y Dec. 11, 1995). Respondent alleges that Complainant was subject to discipline based upon his professional failures, and repeated instances of refusing to follow supervisors' orders. I find and conclude, however, that Complainant has proven that those reasons are specious, and that the real motivation concerned retaliation against him because of his protected activity. I conclude that Dr. Hall has proven that Respondents intentionally discriminated against him for engaging in protected activity.

I find that Respondent's reasons are pretext and that Respondent's adverse actions were discriminatory and in retaliation for Complainant engaging in protected activity.

First, however, I, very briefly, wish to touch upon the issue of dual motive analysis. Under dual motive analysis, a respondent must establish, by a preponderance of the evidence, the existence of a legitimate reason for the taking of adverse employment action against a complainant, and that the respondent would have taken the same action even if the employee had not engaged in protected conduct. **See Simon v. Simmons Foods, Inc.**, 49 F.3d 386, 389 (8th Cir. 1995); **Martin v. The Dept. of the Army**, 1993-SDW-1 (Sec'y July 13, 1995).

This Judge only reaches the dual motive analysis if I determine there is a legitimacy to the Respondent's stated reason for the adverse employment action, a conclusion which I have specifically rejected for the aforementioned reasons. Even so, I find and conclude the Respondent has failed to present sufficient evidence that they would have taken the same action if Complainant had not engaged in protected activity, because the evidence establishes that Respondent's actions and positions were motivated primarily in response to Complainant raising quality concerns.

In view of the clear and direct evidence of Dugway's retaliatory motive in the record, there is no need to analyze asserted reasons offered by Dugway to show they are pretextual. On the record that exists, I find and conclude that it is impossible for Dugway to assert a legitimate non-discriminatory reason for its actions. However, if reviewing authorities should rule otherwise, I further find and conclude that this record makes clear that the reasons asserted by Dugway are in fact pretextual. Pretext is shown from Dugway's false and **post-hoc** evaluations of Complainant's performance over the years, evaluations that are inconsistent with the official performance appraisals at the time, and in the reasons given for his lowered performance evaluations. In some cases, Dr. Hall protesting those lowered evaluations actually got other

managers to intervene and get those performance evaluations increased above the initial management rating.

Pretext is blatantly shown by Dugway's continued reliance on false and unsupported allegations of sexual harassment when no victim of such harassment exists. Dugway was asked by this Administrative Law Judge to bring in a complaining witness if Dugway was to continue to assert these allegations against Dr. Hall but Dugway failed to do so. As already found above, Ms. Carlson does not view the sweater incident as sexual harassment.

Pretext is also shown in the suspension and recommended revocation of Complainant's security clearance purportedly based on mental health problems based on mental exams that had no legal basis, and diagnoses that were based on biased information pursuant to a procedure that had no basis in law.

Pretext is also shown in threats of termination, allegedly based on late reports when the lateness of those reports was orchestrated as part of the conspiracy against Dr. Hall by Respondent.

Pretext is also shown in taking adverse action against Complainant under circumstances where other employees were not sanctioned or where other employees were **post-hoc**, and only after the decision to act against Dr. Hall, treated similarly to Dr. Hall but only as a cover story to avoid the legitimate perception of disparate treatment, and I so find and conclude.

The evidence of retaliatory motive in Dugway's actions against Dr. Hall discussed under the categories above is abundant in the record – both direct and circumstantial evidence. The case law recognizes each category above as evidence of retaliatory motive.

In terms of direct evidence, the gag order issued by Colonel Kiskowski was a clear direct sign of retaliatory motive and intent to discriminate. This situation is analogous to the **Migliore** case where this Administrative Law Judge found:

> Complainant had previously, and repeatedly, provided information to the EPA critical of Mr. Albro and the RIDEM program. Such information was used by the EPA in conducting an audit of the RCRA program, RIDEM's use of federal funds, and served as a basis for PEER's withdrawal petition. Suffice to say, RIDEM failures, highlighted by complaints to the EPA and others, created a great deal of external pressure and embarrassment for Mr. Albro and other RIDEM supervisors. I find that

> because of Complainant's repeated protected disclosures to the EPA, Mr. Albro and Mr. Szymanski sought to prevent Complainant's contact with the EPA. Despite the contradictory testimony on the extent of contact to be allowed, RIDEM sought to curtail Complainant's access to the EPA, and such motivation was an intent to discriminate.

Migliore v. Rhode Island Department of Environmental Management, 1998-SWD-3, 1999-SWD-1, 1999-SWD-2 (ALJ RDO August 13, 1999).

Respondent Has Not Articulated Legitimate Reasons for its Actions

As in **Migliore** quoted below, Respondent Dugway here has failed to articulate any legitimate non-discriminatory business reason for its actions against Dr. Hall, as a result of the existence of both substantial direct evidence of retaliatory motive and because Dugway's actions against Dr. Hall have been based upon and closely interwoven with Dr. Hall's protected activities. As I ruled in **Migliore**:

> All of Respondent's purported legitimate, non-discriminatory business reasons were actually based upon, and closely interwoven with, Complainant's protected activity. For example, I find that the Respondent's allegation concerning Complainant's insubordination in regard to her memoranda responses to Mr. Albro, and regarding the charges in CX 41 and CX 42, were actually based upon, or in response to Complainant's actions where she implicated her protected activity. Further, Director McLeod's memoranda directing Complainant to respond to his questions and threatening "corrective action" were the direct result of her engaging in protective activity by voicing her concerns about American Shipyard to both the EPA and PEER. I also find that Mr. Albro and Mr. Szymanski's statements regarding Complainant's communications with the EPA are actually in response to several EPA investigations of RIDEM, based on Complainant's protected disclosures. While Respondent cites to Complainant's alleged poor performance, the delays and conflicts RIDEM relies upon, actually involved the same cases and circumstances where Complainant was engaging in protected activity. Moreover, the cited delays were actually the result of micro-managing and obstruction by the Complainant's supervisors. Accordingly, I conclude that the Respondent's propounded "legitimate, non-discriminatory reasons" for subjecting

> Complainant to a one-day suspension, and instances of discrimination and harassment, are actually tainted, as the basis for these "legitimate" reasons was really in retaliation for her engaging in protected activity. I find this situation closely analogous to **Passaic Valley Sewerage Commissioners v. United States Dep't of Labor**, 992 F.2d 474 (3d Cir.), **cert. denied**, 50 U.S. 964 (1993), where the Third Circuit held, where there was "no evidence that the Complainant's alleged personality or professional deficiencies [in interpersonal relations] arose in any other context outside his complaint activity," the Respondent's conclusion that the Complainant had a personality problem or deficiency of interpersonal skills was reducible in essence to the problems of the inconvenience the Complainant caused by his pattern of complaints. **Id.** at 481; **see also Dodd v. Polysar Latex**, 1988-SWD-4 (Sec'y Sept. 22, 1994) (concluding that what respondent viewed as poor attitude was nothing more than the result and manifestation of the Complainant's protected activity). I agree that this case presents a situation where all of Respondent's alleged "legitimate" reasons are essentially complaints about the inconvenience and difficulties caused by Complainant raising safety concerns. Therefore, I find and conclude that Respondent has failed to produce a legitimate, non-discriminatory reason for subjecting the Complainant to adverse action, and as a result, Complainant has met her claim for intentional discrimination and is entitled to damages.

Migliore v. Rhode Island Department of Environmental Management, 1998-SWD-3, 1999-SWD-1, 1999-SWD-2 (ALJ RDO August 13, 1999).

While Respondent in the case at bar points to several employees who were disciplined for various reasons, those were proper management reasons for proper administrative and/or personnel reasons. However, Complainant was treated in a disparate manner and in such an obvious fashion that he was finally forced to leave Dugway to keep his sanity and health.

Respondent also suggests that Dugway did not create or allow a hostile work environment, although due to Complainant's depressed, dysthymic, and/or paranoid type mental disorder, Complainant may have actually believed he was the victim of a hostile work environment. Respondent also points out that Dr. Hall's psychological and medical problems existed before he became employed at Dugway and therefore were not caused by Dugway.

I agree to a certain extent but I also disagree - - first of all, to be affected by the death of a family cat of 16 years is not unusual, and for Respondent's counsel to imply that that is an unusual stressor simply offends all "cat-lovers" in the world.

Furthermore, while Complainant's psychological problems may have been aggravated by his own self-induced stress typically found in a so-called Type A individual, especially one who is a perfectionist, and while non-employment stressors were present in his life, there is absolutely no doubt that Complainant's psychological problems were aggravated, exacerbated and accelerated by the discriminatory, adverse and disparate treatment he received from his supervisors - both military and civilian - and from his co-workers, and I so find and conclude.

While Dr. McCann opined that he "can see no evidence in the record or in (his) evaluation that Dr. Hall has experienced any type of mental illness or consequences of mental illness which could be caused by the actions of Dugway" (TR 5141), that opinion refers **ONLY TO DIRECT CAUSATION** and does not rule out the logical inference by this Administrative Law Judge - - who has presided over workers' compensation claims for over twenty-four (24) years - - that the actions of Dugway - through any of its employees - did aggravate, accelerate or exacerbate Dr. Hall's acknowledged pre-existing psychological problems, and I so find and conclude.

While Complainant left Dugway in June of 1997, these stressors - both non-employment and employment-related - have continued because of his worsening health and financial condition and this protracted litigation, litigation, I might add, marked by a vigorous defense.

Thus, I firmly believe that this matter should have been voluntarily resolved years ago - - However, such did not happen, apparently not to make a peace treaty with "a traitor," to quote that military officer.

According to Respondent, "The only act that took away his security clearance was his voluntary act of retiring." I strongly disagree. Dr. Hall was forced to retire because of the actions of the Respondent and because Dr. Tedrow recommended that he get out of that environment. I strongly agree with that medical recommendation of the doctor.

Respondent was well aware of Dr. Hall's employment history at IBM, Locktite and Webb High School before hiring him. Thus, Respondent should not be allowed to say now in defense: "the bottom line is that Complainant was let go from at least three

(actually two) jobs before he came to work at Dugway."

Yes, Complainant challenged his supervisors and co-workers at Dugway - I see nothing wrong with this. Dugway views that as a personality problem, apparently looking only for so-called "yes men and women" at that military facility.

I note that Respondent alleges that Complainant's "anxiety caused him to fight going to trial and delay the hearing for years on end." I disagree - - the hearing was delayed several time due to Complainant's multiple medical problems and once due to this Court's budgetary problems and once due to the retirement of my distinguished colleague, Daniel L. Stewart.

I agree that Complainant did have certain interpersonal problems with his relationships with Carol Fruik, Carol Milliken and Ms. Edgeman. However, I disagree with the statement of Respondent's counsel that Dr. Hall was "harassing Deanna Carlson for a short time." Ms. Carlson did not view that automobile/sweater incident as such - notwithstanding the efforts of others to characterize it as such - Complainant and Ms. Carlson have remained friends to this very day, apparently to the dismay of Respondent.

As already noted above, Respondent cites Deanna Carlson - but she, to this day, has steadfastly refused to lodge a formal complaint against Dr. Hall, despite the urging of certain of the supervisors and the then head of the JAG office to do so - - As noted, Ms. Carlson and Dr. Hall have remained friendly to this day - not the usual situation wherein one allegedly was the victim of sexual harassment. Complainant's alleged "misconduct" has been greatly exaggerated in an attempt to put Respondent's defense in the best light. The instances of misconduct cited by Respondent in its reply brief at pages 68-72 are simply examples of steps Dr. Hall found it necessary to take to deal with his personal, family and employment problems. There is nothing sinister about those steps, especially given the conspiracy against him at Dugway.

While Complainant concedes that he had "depression" in his interview with Dr. McCann (TR 8138), that is simply a reflection of the treatment to which Dr. Hall was subjected at Dugway, which treatment aggravated, accelerated, and exacerbated his pre-existing psychological problems, and I so find and conclude.

Furthermore, while Respondent submits that there was "no involuntary reassignment" of Dr. Hall to JOD, this record is replete with instances of adverse action taken against Dr. Hall by Dugway because of his protected activities, and while Respondent

points out that Complainant's own witnesses were unable to cite any such examples, the answer is simply that Dr. Hall did not get together with these witnesses and rehearse or suggest their testimony in any way.[6] Complainant has proven numerous instances of adverse action and these have been enumerated above.

Moreover, having to undergo a psychiatric evaluation is an adverse action when the doctor, Dr. Hoffman, giving the evaluation, saw no need for such evaluation.

That these adverse actions, or any of them, may not be grievable under the regulations or union procedures is simply irrelevant. The test is whether these adverse actions were taken by Respondent in retaliation for protected activities.

While the CCF notified Complainant that his security clearance would be revoked because of his mental condition, I find and conclude that the real reason, **sotto voce**, was that he was not a team player, was a whistleblower and had engaged in protected activities virtually from the first day of his employment at Dugway.

Respondent has also tried to justify its actions herein by describing Dr. Hall's performance at Dugway as marginal. However, such poor work performance is not reflected in the bottom line of his performance appraisals, **i.e.**, his actual overall rating. These performance appraisals lead me to believe that certain of Dr. Hall's supervisors - while engaging in the usual negative rhetoric verbally about him at Dugway and at the trial - refused to reflect that rhetoric in the performance appraisals, written documents that may be used for another purpose - as had happened here, **i.e.**, documents in the record that actually support Dr. Hall's case.

Moreover, while Dugway supervisors recorded factual and negative comments in Complainant's performance appraisals, Complainant's alleged performance problems were really due to the requirement by other supervisors that he assist some of his co-workers and by the contradictory demands on his professional time and were, in my judgment, part of the grand conspiracy against Dr. Hall because (1) he was not a "team player," (2) he was a whistleblower and (3) had engaged in protected activities to protect the public interest at that federal facility.

Dugway also submits that it acted properly in maintaining

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[6]This statement is limited to Dr. Hall and his witnesses and there should be no inference as to the actions of Respondent's counsel who has thoroughly and most professionally represented the Respondent herein.

records about Complainant's employment because of this action, which was initiated (four months) before he retired and because Army Regulation 25-400-2 provided for maintaining CPRP records for forty years. While that statement may be proper, I do have problems with the so-called "supervisor's file" because it is this file that was passed from supervisor to supervisor and that contained much negative and obsolete information about Dr. Hall, apparently to keep Dr. Hall's new supervisor up-to-speed about his protected activities and the trouble that he was causing everyone at Dugway.

I note that the Respondent posits that Complainant's allegation that Major General M.G. Aiken called him a traitor was false, and even if it were true, General Aiken had left that Command many years before Complainant allegedly heard of the remark.

I disagree strongly. I accept Complainant's testimony that that remark was made, especially as I do not credit the one witness who denied making that remark to Dr. hall. I find and conclude (1) that that remark was made, (2) that that remark reflected the attitude of many others at Dugway, (3) that it was passed on verbally throughout Dugway and (4) that it epitomized the negative attitude manifested against Dr. Hall.

I note with considerable interest that Respondent did not take the post-hearing deposition of General Aiken. Cost certainly cannot be a factor, given the plethora of witnesses, documents and evidence produced by the Respondent, especially dealing with such a serious allegation, one that may be slanderous. Moreover, there is no evidence that General Aiken was unavailable for such deposition. Thus, I shall draw an adverse inference by his absence herein.

Respondent also attempts to justify its actions herein on the basis of Complainant's substantial history of using mental health professionals for years, and pointing out that his erratic behavior, CCF's and Dugway's Action of Sending Complainant to, or asking him to undergo Mental Health Evaluations, were totally appropriate. "Complainant had problems at IBM, Locktite and Webb High School and he lasted at Dugway for 11 years, three years longer than at any other employer. This tends to indicate that he was treated better at Dugway and that Dugway was more tolerant of his mischief and marginal work productivity, than any other employer."

I disagree very strongly for the reasons that have already been articulated herein.

Respondent also submits that Dugway had regulatory grounds to temporarily disqualify or administratively terminate Dr. Hall from the CPRP.

I disagree. Respondent should have worked with Dr. Hall in a positive way and help him to deal with his personal and employment problems in a constructive way. However, this was not done and this lack of cooperation by the Respondent aggravated, accelerated and exacerbated his problems.

Moreover, when his CPRP was administratively terminated, he was not given notice thereof. Respondent submits that notice of such termination is not legally required. That may be so but common sense and common courtesy dictate that at least verbal notice be given to the affected employee. In this case, Dr. Hall obtained notice thereof embarrassingly when he was denied access while escorting a visitor to the exclusion area.

Respondent also submits that CCF and Dugway had grounds to suspend and recommend revocation of Dr. Hall's security clearance due to his mental health history and the law requiring that the granting of a security clearance must be consistent with the National Security Interest.

I disagree. Dr. Hall in early 1997 received that notice based on past charges of which he believed he had been cleared, first by the Colonel Cox in the so-called "clean slate" letter in October of 1991 (CX 14), and then by subsequent favorable work appraisals and by favorable results in his mental evaluations in the sense that there was no evidence found to warrant his termination.

While Dr. Hall's retirement ended that proceeding, the fact remains that he was forced to retire (1) by the Respondent's conspiracy and (2) upon his Doctor's advice. Dr. Hall's retirement can hardly be characterized as "voluntary," especially given Dr. Tedrow's medically sound recommendation that Dr. Hall leave behind his employment-related problems.

According to Respondent, the review of Complainant's Security Clearance and the length of notice given to him complied with Statute, Executive Order, DOD Directive and Army Regulation, and that Dugway used the proper procedures for the actions it took regarding Complainant's security clearance.

That may well be so but the fact remains that the procedure was instituted as part of the conspiracy against Dr. Hall and to get rid of him because he was not a "team player." The fact that Dugway followed proper procedures does not negate the fact that Dr.

Hall's employment-related problems were the direct result of the hostile work environment fostered and perpetuated at Dugway by Dr. Hall's supervisors and the compliant co-workers who were part of this conspiracy against Dr. Hall.

Respondent also suggests that Dr. Hall's objection and response to the Intent to Revoke his security clearance did not exhaust his available administrative remedies within the DOD's Office of Hearings and Appeal.

I disagree, because **Sergeant Perry Watkins v. U.S. Army**, 875 F.2d 699, 1989 U.S. App. LEXIS 6049 (9th Cir. 1989) is clearly distinguishable as it involves a member of the military service and does not involve a request for hearing under the federal whistleblower statutes. Moreover, an individual on active duty, unlike Dr. Hall, a civilian employee, is subject to the rules and regulations of the particular branch of service plus the pertinent **Status of Forces Agreement** for transgressions occurring on foreign soil, for instance.

Respondent characterizes Dr. Hall's allegations as absurd and, if his claims are granted, would deny the ability of an agency involved in National Security Work to remove "a mentally disordered person from the CPRP."

Initially, I deny that Dr. Hall's allegations are absurd and, second, I hold that the agency's ability must not be exercised in such a way as to frustrate an employee's rights under the whistleblower statutes. There are many ways by which the agency can protect National Security but the agency, in this case Dugway, must not deny Dr. Hall's rights under the whistleblower statutes.

After "9/11," the rights of whistleblowers have been greatly enhanced and, just recently, President George W. Bush, as our Chief Executive and Commander in Chief, directed all federal employees to bring to the attention of appropriate personnel their "suspicious" concerns about safety and, if ignored as were the suspicions of F.B.I. Special Agent Coleen Rowley, to bring those concerns to the Director of Homeland Security and even to the White House, if necessary. Thus, that constitutes a presidential directive to ignore the chain-of-command if necessary. Moreover, the cases cited by Respondent are clearly distinguishable as Dr. Hall has neither been charged with nor convicted of any of the offenses found in the cases involving **Gregory Scott** (cocaine use), **Ernest Brazil** 66 F.3d 193 (9th Cir. 1995)(involving a Title VII claim of alleged racial discrimination under the provisions of the EEO Act), **Keith Meinhold** (34 F.3d 1469 (9th Cir. 1994)(involving the military's so-called "**DON'T ASK, DON'T TELL**" policy as to the

individual's sexual orientation), and **Sandra M. Thompson and George Stout**, 884 F.2d 113 (4th Cir. 1989) (refusal to undergo random drug testing).

According to Respondent, Dr. Hall's claim is without merit and, if granted, would deny a federal agency its statutory right to assign work and require merit performance of that work.

Initially, I deny that Dr. Hall was unwilling to complete his tasks on time. Moreover, he was unable to complete them timely because of the conspiracy against him, a conspiracy that went from the highest levels of Dugway (**e.g.**, Colonel Como "rubber stamping" the allegations against Dr. Hall) to Dr. Hall's supervisors and to his compliant, docile and "team playing" co-workers.

As I have already found and concluded above, Dr. Hall is an intelligent, honest, dedicated and conscientious chemist who always tried to do his best at Dugway but who was frustrated by his supervisors and certain co-workers, at every opportunity, especially by Christina Wheeler. Furthermore, that Ms. Wheeler may have been abrasive and caustic to others at Dugway is no defense herein involving allegations of retaliation for having engaged in protected activity under the whistleblower statutes, and I so find and conclude.

Moreover, the disagreement with Dugway is more than "marginal" under the whistleblower statutes and retaliation for such protected activity. One further point: I find no similarity between Dr. Hall's problems at Dugway and those of Wen Ho Lee, an individual at Los Alamos who pleaded guilty to transferring willfully data he knew could be damaging to the United States. While General Aiken referred to Dr. Hall as "a traitor," apparently because of his whistleblowing and because he was not a "team player," no such charges have been filed against Dr. Hall, and there has been no hint that any of his actions rose to that level. If such were the case, Dr. Hall would have been a defendant in another forum.

I also find and conclude that **Ilgenfritz v. U.S. Coast Guard Academy**, ARB Case No. 99-066 (August 28, 2001), and the other cases cited by Respondent's counsel in his admirable attempt to defeat this claim, are clearly distinguishable because this record leads ineluctably to the conclusion that Dr. Hall's employment-related problems directly resulted from that conspiracy against him, issues not involved in those proceedings cited by counsel.

On the basis of the totality of this closed record and resolving all doubts in favor of Dr. Hall to effectuate the spirit and purposes of the whistleblower statutes, I find and conclude

that Dr. Hall was constructively terminated by Dugway by means of the hostile work environment created at Dugway as part of the conspiracy against him, a conspiracy engendered because of his protected activities that began at Dugway within a few months of his employment. Dr. Hall was frustrated at every opportunity and he finally was forced to retire upon his doctor's advice.

While I understand that Respondent's counsel must try to put all events in proper light for his client, I simply cannot agree that this proceeding is simply about an honest "disagreement with management over environmental issues." This case involves the creation of a hostile work environment and a pattern of retaliation over the years because of Dr. Hall's protected activities.

Respondent relies on Complainant's pre-Dugway employment and psychological and psychiatric counseling as one of the reasons to deny the claim filed by Dr. Hall.

Initially, I note that the OSHA investigation is entirely irrelevant and immaterial herein as this is a **de novo** hearing and my decision herein will be based upon my review and analysis of all of the documents in this closed record as fully perfected by the parties.

Complainant's pre-Dugway employment history simply establishes that he is a conscientious and dedicated employee who has always attempted "to do the right thing." He certainly is not a phony or a sycophant who "goes along to get along" and who says the "right things" in this "politically correct era" simply to ingratiate himself with his superiors.

This case is further compounded by the fact that Complainant, a highly-educated professional chemist, is a civilian employee at a military facility and subject to its dogmatic, autocratic and hierarchical structure, and I say this with all due respect to our dedicated people in the U.S. military and coming from one who has spent a total of six (6) years in Army M.I. and who is proud of such service.

Yes. Complainant did have pre-existing personal, family and psychological problems before going to work for the Respondent in February, 1986. However, Respondent hired him with full knowledge of these problems because he is, in my judgment, a brilliant chemist whose talents Respondent needed. It is obvious that Complainant's problems were aggravated and exacerbated by the harassment, discrimination and disparate treatment by the Respondent, almost from day one in 1987. It is well to keep in mind that an employer takes each employee "as is" and with all of

our human frailties and the employer will be responsible for the aggravation and exacerbation of such pre-existing problems, and it is no defense for the employer to say that he/she had those problems prior to employment with us and, thus, we are not responsible therefor. In this regard, **see Wheatley v. Adler**, 407 F.2d 307 (D.C. Cir. 1968).

Respondent, in my judgment, should have taken steps to provide Dr. Hall with the time, help and resources that he needed; instead, Respondent discriminated against him, most particularly during the regime of Colonel Kiskowski, and these instances have been thoroughly delineated and discussed above. It is apparent, even to the cursory reader of these transcripts, that Complainant was a whistleblower, that the Respondent knew about this status, that the Respondent used a number of means to make it difficult for him to do his job to such an extent that finally, as a result of his doctor's advice, he was forced to take an early retirement in June of 1997 to preserve his health, however, four (4) months after filing the complaints herein.

Respondent makes much of Complainant's interactions with several female employees at Dugway in an attempt to justify the psychological examinations to which Complainant was subjected. It is apparent to this fact-finder that Complainant, having gone through a tumultuous marriage and an acrimonious divorce, was and still is a lonely person who needs friends and companions and who, in hindsight, perhaps should not have mixed his professional and social life, given the conspiracy against him and the existence of that so-called supervisors' file. However, he did so and the Respondent is using this aspect of his personality to defeat the claim. As already noted above, Respondent points to an episode in an automobile when Complainant removed a piece of hair from the sweater - at about upper chest level - of a female passenger, and a female in the back seat - obviously out to get him - yelled out, "that's sexual harassment." However, the alleged victim did not regard it as such and to this day she has yet to file a formal complaint against him. To this day, Complainant and she remain good friends. It is ludicrous to allege that he was "stalking" women. He simply wanted and needed friends and companionship. So much for Complainant's "problems" with women.

Moreover, I put little credence in the cards and letter he sent to several women as simply an attempt to inject some levity and humor into his otherwise demanding but lonely professional life.

While Respondent refers to Complainant's memoranda and letters as "rambling," I view those documents as simply written by a person

in the so-called “stream of consciousness” writing style. I was able to understand what was written and this again is an attempt by Respondent “to grasp at straws” and raise all possible issues against Dr. Hall, hoping that one of the issues will stick.

This case really boils down to the simple fact that there existed at Dugway a conspiracy among virtually all of those who came into contact with the Complainant to get him because he was a whistleblower and one who would not stay within the military chain-of-command because his internal complaints to his superiors were producing no results.

The need for mental examinations is, in my judgment, another specious reason in the trumped-up allegations against Complainant. While Dugway has the absolute right to maintain and ensure the integrity of the CPRP, it must treat all employees in the program fairly and equally. As is delineated and discussed above, Complainant was discriminated against in the manner that Dugway operated the program as the exams were simply another way to get him and force him to retire. In this aspect, Respondent succeeded.

For instance, Complainant was chastised for using government e-mail for personal purposes, but no one else was so similarly reprimanded, at least based on this closed record.

Moreover, I put little credence on the medical evidence presented by Respondent because, in my judgment, it is all part of this conspiracy against the Complainant and, if Respondent really believed that evidence, it should have immediately removed him from the CPRP permanently and taken steps to terminate him as an employee years ago. However, the Respondent did not do so and I infer this is because the evidence was so flimsy and would not justify a termination.

I place greater weight on the opinions of Dr. Christie and Dr. Tedrow who have seen and evaluated Complainant for many years and are in a better position to render well-documented and well-reasoned opinions, and they have done so herein.

I agree that Complainant does have psychological problems but they did not affect his professional work, as long as Respondent gave him reasonable assignments and reasonable deadlines. However, Respondent did not do so and took a series of actions against him to delay his work and to make it difficult for him to remain at Dugway.

With reference to the change of the chemical surety regulations and the requirement for reinvestigation of security

clearances every five (5) years, this was a hotly contested issue and produced conflicting testimony as to what that regulation required and when it was required. This was also handled in a disparate manner vis-a-vis Complainant. Initially, others were given additional time to complete their applications. Several did not even return their applications. Complainant was not given that opportunity. (CX 1) Furthermore, I agree with Complainant and Mr. Bowcutt that Dugway misinterpreted the rule with reference to those employees who had not had a break in service since issuance of their current clearances.

As I have already noted above, I am also concerned that (1) Complainant was administratively terminated from the CPRP on July 9, 1996 by Dr. Dement, (2) was not told of such termination by anyone at Dugway and (3) he did not find out about it until several months later when he was denied entrance into a chemical exclusion area. Such lack of notice, in my judgment, is another act of blatant disparate treatment and I reject Respondent's argument that the regulation does not require such notice, because common courtesy and common sense require such notice so that the person affected can take proper steps to protect his/her rights in close proximity to the administrative termination.

With reference to the June, 1996 DIS investigation of the Complainant, the investigator talked to numerous individuals at Dugway but did not talk to Dr. Hall to get his version of the stories these individuals were telling the investigator. A blatant lack of due process and another example of disparate treatment, and I so find and conclude.

With reference to the CCF request that Complainant undergo a mental evaluation, that was completed and on January 7, 1997 Complainant was notified that CCF intended to revoke his security clearance. However, on February 13, 1997 he filed his DOL complaint herein and on May 21, 1997 he announced that he was seeking an early retirement, effective as of June 12, 1997, based on the advice of his doctors, especially Dr. Tedrow who has opined that Complainant suffers from post-traumatic stress syndrome, a diagnosis that I accept as reasonable and well-documented.

As noted above, a number of continuances were granted herein because of Complainant's medical condition and the trial began on June 7, 2001 and while discovery herein may have been initially delayed by these continuances, once the matter was assigned to this Judge, I advised the parties that discovery was an on-going issue herein and that discovery would be permitted until the close of the record herein on May 28, 2002. Thus, as Complainant learned through recently furnished evidence of new allegations against him,

this required that Complainant add additional elements to the theory of his case. There has been no prejudice against Respondent because both sides were given every opportunity to follow-up every lead and to present additional documentation in support of their respective positions as long as the evidence was relevant, material and not unduly cumulative.

Respondent submits that "there were around twenty (or thirty?) direct conflicts between the testimony of the Complainant and Respondent's witnesses." (RX A at 115-129) I disagree as I find Dr. Hall to be an honest, conscientious and dedicated individual who testified most credibly before me. I have credited his version of these alleged "conflicts" and any confusion is obviously due to the passage of time and Dr. Hall's medical condition. These whistleblower cases, in the absence of the "smoking gun," are determined by circumstantial evidence and the evaluation of the credibility of the witnesses, as I have already discussed above.

I also find and conclude that Respondent's hiring in June of 2001 of Gary Millar, an acknowledged whistleblower, does not defeat this claim for the obvious reason that not hiring an individual for a position where there is a vacancy and for which the person is obviously qualified may constitute so-called "black-balling" where the refusal to hire was motivated primarily by his/her protected activity. If such had occurred, Dugway could very well have been a Respondent in another proceeding before one of my colleagues.

In summary, I find and conclude that Complainant raised a great deal of concerns over the procedures and policies at Dugway. His actions were the source of a great deal of pressure for Dugway management from the Utah state agency. Further, Dugway has been severely criticized and embarrassed by Complainant's protected activity. As a result, I find and conclude that Respondent has clearly, continuously and illegally discriminated against Complainant through harassment, disciplinary procedures and outright threats. Accordingly, I find and conclude that all of Respondent's purported, legitimate reasons for taking adverse actions against Complainant are, in fact, pretext. Complainant has met his burden of proving that Respondent has intentionally discriminated against him for engaging in protected activity concerning the proper enforcement of the Acts involved herein. As such, Complainant is entitled to an award of damages.

This Judge, having found the Respondent in violation of the aforementioned whistleblower statutes, will issue a recommendation on damages to be awarded to Complainant. Complainant requests front pay, back pay, compensatory damages, equitable relief, and attorney fees and costs.

IV. DAMAGES AND RELIEF SOUGHT

A. GENERAL DISCUSSION

As I have already held in other decisions, the environmental statutes provide liberally for an award of damages sufficient to place the employee in the position they would have been absent the retaliation. Thus, it is well to keep in mind certain well-settled principles.

> Section 507(b) of the Clean Water Act (CWA), 33 U.S.C. Sec. 1367(b), provides in pertinent part: "If [the Secretary] finds that ... a violation did occur, he shall issue a decision, incorporating an order therein and his findings, requiring the party committing such violation to take such affirmative action to abate the violation as the Secretary of Labor deems appropriate[.]" "Affirmative action to abate [a] violation" of an environmental whistleblower statute, such as Sec. 507(a), includes retroactive promotion into a position the discriminatee would occupy but for the discrimination. **See Thomas v. Arizona Public Svs. Co.**, No. 89-ERA-19, slip op. at 13 (Sec'y Sept. 17, 1993). "Making a victim whole ... include[s] his reinstatement to the position he would have held but for the discrimination." **Lander**, 888 F.2d at 156; **see also Malarkey v. Texaco, Inc.**, 983 F.2d 1204, 1214 (2d Cir. 1993).
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> Cases under Title VII of the Civil Rights Act of 1964, **as amended**, 42 U.S.C. Sec. 2000e-5, have guided the Secretary and the Administrative Review Board (ARB) in fashioning remedies appropriate to abate violations. **Hobby v. Georgia Power Co.**, No. 90-ERA-30, slip op. at 15 (ARB Feb. 9, 2001). Like the remedies under Title VII, those available under the environmental whistleblower laws serve a twofold purpose. First, they are intended to make the complainant whole by placing him, "as near as may be, in the situation he would have occupied if the wrong had not been committed." **Albemarle Paper Co. v. Moody**, 422 U.S. 405, 418-19 (1975). Second, they must "so far as possible eliminate the discriminatory effects of the past **as well as bar like discrimination in the future." Id.** at 418, **quoted in Hobby** at 7 (ARB's emphasis). This goes beyond the interest of employees in protection from discrimination. It also serves the public interest in assuring exposure of threats to public health and safety, such as the discharge of sewage into streams,

rivers and lakes. **See Beliveau v. DOL**, 170 F.3d 83, 88 (1st Cir. 1999).

Moder v. Village of Jackson, Wisconsin, 2000-WPC-0005 (ALJ Aug. 10, 2001).

Back pay is clearly provided for:

The "goal of back pay is to make the victim of discrimination whole and restore him [or her] to the position that he [or she] would have occupied in the absence of the unlawful discrimination." **Blackburn v. Martin**, 982 F.2d 125, 128 (4th Cir. 1992). **Also See Creekmore v. ABB Power Sys. Energy Servs., Inc.**, 1993-ERA-24 (Dep. Sec'y Feb. 14, 1996) .

Complainant is correct to note that any uncertainties with regard to the amount of back pay are to be resolved against the discriminating party. **McCafferty v. Centerior Energy**, 1996-ERA-6 (ARB Sept. 24, 1997).

The award of back pay effectuates the remedial statutory purpose of making whole the victims of discrimination, and "unrealistic exactitude is not required" in calculating back pay and "uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating [party]." **EEOC v. Enterprise Ass'n Steamfitters Local No. 6348**, 542 F.2d 579, 587 (2d Cir. 1976), **Steamfitters Local No. 6348**, 542 F.2d 579, 587 (2d Cir. 1976), **cert. denied**, 430 U.S. 911 (1977), **quoting Hairston v. McLean Trucking Co.**, 520 F.2d 226, 233 (4th Cir. 1975). Initially, the Complainant bears the burden of establishing the amount of back pay that a respondent owes. **Adams v. Coastal Production Operation, Inc.**, 89-ERA-3 (Sec'y Aug. 5, 1992). Once the Complainant establishes the gross amount of back pay due, the burden shifts to the Respondent to prove facts which would mitigate that liability. **Lederhaus v. Donald Paschen & Midwest Inspection Service Ltd.,** 92-ERA-13 (Sec'y Oct. 26, 1992), slip. op. at 9-10; **Moody v. T.V.A.**, Dept of Labor Decisions, Vol. 7, No. 3, p. 68 (1993).

Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 (ALJ Sept. 1, 1994).

It is appropriate to review other types of wrongful termination cases, as well as awards in other whistleblower decisions involving emotional distress, to assist in the analysis of the appropriate measure of compensatory damages in a whistleblower case. Accordingly, this is precisely what this Judge has done. **See Crow v. Noble Roman's, Inc.**, 1995-CAA-8 (Sec'y Feb. 26, 1996)(approving an award of $10,000.00 in compensatory damages);[7] **Creekmore v. ABB Power Sys. Energy Servs., Inc.**, 1993-ERA-24 (Dep. Sec'y Feb. 14, 1996) (wherein the Deputy Secretary upheld this ALJ's recommendation of $40,000.00 in compensatory damages);[8] **Gaballa v. Atlantic Group, Inc.**, 1994- ERA-9 (Sec'y Jan. 18, 1996)(wherein the Secretary reduced the ALJ's recommended compensatory damage award from $75,000.00 to $25,000.00);[9] **Smith v. Littenberg**, 992-ERA-52 (Sec'y Sept. 6, 1995) (wherein the Secretary affirmed the ALJ's award of $10,000.00);[10] **Blackburn v. Metric Constructors, Inc.**, 86-ERA-4 (Sec'y Aug. 16, 1993) (wherein the

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[7]The evidence proved that the complaint was terminated without any warning, and could not afford insurance. The complainant also had to receive food stamps for a period of time.

[8]The ALJ found that the evidence established that the discriminatory conduct caused Complainant severe stress, leading to a heart attack. While questioning the sufficiency of the causative evidence in regard to the heart attack, the Deputy Secretary concluded that the record of the stress claim and pain attacks was sufficient to justify the award of compensatory damage. Specifically, the Deputy Secretary noted that the complainant suffered a great deal of embarrassment over a lay off after twenty-seven years with the employer, and that complainant suffered family disruption by his need to travel for consulting work.

[9]The ALJ recommended a $75,000 compensatory damage award based on the treating psychologist's finding that complainant suffered from chronic stress, paranoid thinking, a general distrust of others, a lack of confidence in his engineering judgment, a fear of continuing repercussions, and a general feeling of apathy. The psychologist further testified complainant will forever suffer from a full-blown personality disorder and a permanent strain on his marital relationship. The Secretary reduced the award based on the fact that the same psychologist indicated this psychological state was caused in part by a co-respondent who had previously settled out of the case and that part of that settlement compensated for part of complainant's compensatory damages.

[10]The evidence established that the complainant suffered from severe mental and emotional stress, including psychiatric evidence that the complainant was "depressed, obsessing, ruminating and ha[d] post-traumatic problems," following the discriminatory discharge.

Secretary reduced the ALJ's recommended award of compensatory damages to $5,000.00);[11] **Lederhaus v. Paschen**, 1991-ERA-13 (Sec'y Oct. 26, 1992) (wherein the Secretary reduced the compensatory award from a recommended amount of $20,000.00 to $10,000.00);[12] **McCuistion v. Tennessee Valley Auth.**, 1989-ERA-6 (Sec'y Nov. 13, 1991) (wherein the Secretary increased compensatory damages from the ALJ's recommended award of $0.00 to $10,000.00);[13] **Martin v. The Department of Army**, 1993-SDW-1 (ARB July 30, 1999) (wherein the ARB awarded $75,000.00 in compensatory damages for emotional

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[11]The testimony of complainant, his wife, and his father established complainant was of the opinion that firing someone was like saying that person is no good. The evidence also established complainant felt really low and that he relied on is father to come out of depression. The termination affected complainant's self-image and impacted his behavior, which became short with his wife. The wife testified to the stress and emotional strain on the marital relationship and the father testified to complainant's pride and work ethic and the fact that complainant felt sorry for himself after the termination.

[12]In **Lederhaus**, the evidence established complainant remained unemployed for 5 ½ months after his termination, he was harassed by bill collectors, foreclosure was begun on his home and he was forced to borrow $25,000 to save the house. In addition, complainant's wife received calls at work from bill collectors and her employer threatened to lay her off. Complainant had to borrow gas money to get to an unemployment hearing and experienced feelings of depression and anger. Complainant fought with his wife and would not attend her birthday party because he was ashamed he could not buy her a fit, the family did not have their usual Christmas dinner, and complainant would not go to visit his grandson. In fact, complainant cut off almost all contact with his grandson. The evidence revealed complainant became difficult to deal with and this was corroborated by testimony from complainant's wife and a neighbor. Complainant contemplated suicide twice.

[13]The evidence revealed the complainant was harassed, blacklisted, and fired. In addition, complainant lost his livelihood, he could not find another job, and he forfeited his life, dental and health insurance. The blacklisting and termination exacerbated complainant's pre-existing hypertension and caused frequent stomach problems necessitating treatment, medication, and emergency room admission on at least on occasion. Complainant experienced problems sleeping at night, exhaustion, depression, and anxiety. Complainant introduced into evidence medical documentation of symptoms, including blood pressure, stomach problems, and anxiety. Complainant's wife corroborated his complaints of sleeplessness and testified he became easily upset, withdrawn, and obsessive about his blood pressure.

distress);[14] **Jones v. EG&G Defense Materials, Inc.**, 1995-CAA-3 (ARB Sept. 29, 1998) (wherein Board adopted ALJ's award of $50,000.00);[15] **Smith v. Esicorp, Inc.**, 1993-ERA-16 (ARB Aug. 27, 1998) (wherein the Board reduced the ALJ's recommendation of $100,000.00 in compensatory damages to $20,000.00);[16] **Michaud v. BSP Transport, Inc.**, 1995-STA-29 (ARB Oct. 9, 1997) (wherein the Board approved an award of $75,000.00 in compensatory damages);[17] **Doyle v. Hydro Nuclear Services**, 1989-ERA-22 (ARB Sept. 6, 1996) (wherein the Board affirmed the ALJ's recommendation of $40,000 compensatory damages);[18] **Bigham v. Guaranteed Overnight Delivery**, 1995-STA-37 (ALJ May, 8, 1996) (adopted by ARB Sept. 5, 1996) (wherein the Board increased the ALJ's award of compensatory damages from $2,500 to $20,000 after reviewing the observations and accounts of complainant's emotional distress);[19] **Sayre v. Alyeska Pipeline**,

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[14]The evidence revealed severe emotion distress based upon psychological records of major depression and suicidal thoughts.

[15]The evidence Complainant suffered embarrassment from having to look for work, and having his car and home repossessed. Evidence also reflected stress due to loss of medical insurance and familial stress.

[16]The evidence that the discriminatory conduct was limited to several cartoons lampooning complainant, and that the complainant did not suffer loss of a job or blacklisting and did not incur financial losses, and evidence of mental and emotional injury was limited to his own testimony and that of his wife.

[17]The evidence established that complainant from major depression caused by a discriminatory discharge, as supported by reports of a licensed clinical social worker and psychiatrist. Further, evidence showed increased stress and humiliation at having a bank foreclose on Complainant's home and the loss of savings.

[18]The evidence which supported an award in this amount consisted of complainant's consulting physicians who prescribed anxiety and depression medications, as well as other medications for chest pain; a treating psychologist testified that respondent's discriminatory acts caused complainant's anxiety disorder and post-traumatic stress disorder and respondent failed to offer any countervailing evidence on causation; and that same psychologist testified complainant's wife and children noticed a radical change in complainant's behavior, a serious strain in the marital relationship, and that divorce proceedings were begun, although the couple did eventually reconcile.

[19]At the hearing, the complainant testified to his lowered self-esteem and uncommunicativeness, to his change in sleep and eating habits, and to the adverse effect on his marriage. He also testified that he was not interested in socializing, felt 'less than a man' because he could not support his family, and that the family experienced

1997-TSC-6 (ALJ May 8, 1999)(wherein ALJ awarded $10,000.00 in compensatory damages);[20] **Leveille v. New York Air Nat'l Guard**, 1994-TSC-3/4 (ALJ Feb. 9, 1998)(wherein ALJ awarded over $80,000.00 in compensatory damages based upon past and future emotional stress, past and future medical expenses, and damage to professional reputation);[21] **Berkman v. United States Coast Guard Academy**, 1997-CAA-2/9 (ALJ Jan. 2, 1998)(wherein the ALJ awarded $70,000.00 in compensatory damages).[22]

In **Van Der Meer v. Western Kentucky Univ.**, 1995-ERA-38 (ARB Apr. 20, 1998), the complainant suffered little out-of-pocket loss: he lost no salary as a result of the leave of absence and there was no evidence of uncompensated medical costs. Other losses were non-quantifiable. The complainant, however, was awarded $40,000 in compensatory damages because the respondent took extraordinary and very public action against the complainant which surely had a negative impact on complainant's reputation among the students, faculty and staff at the school, and more generally in the local community; complainant was subjected to additional stress by the respondent's failure to follow the conciliatory procedures contained in its handbook and complainant testified that he felt humiliated.

In **Smith v. Esicorp, Inc.**, 1993-ERA-16 (ARB Aug. 27, 1998), the ARB noted that, "The severity of the retaliation suffered by [a complainant] is also relevant to our determination of appropriate compensatory damages. The courts have held that the more inherently humiliating and degrading the defendant's action, the more

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a sparse Christmas. Finally, complainant testified the family had to cancel their annual summer vacation and charge the credit cards to the limit. Complainant's wife testified she noticed complainant's withdrawal in the weeks after Christmas.

[20]The complainant testified to severe stress caused by work-place discrimination.

[21]The evidence established severe emotional pain and suffering. Further the complainant suffered from anxiety attacks, shortness of breath and dizziness caused on the work-related stress. The complainant also submitted evidence of marital friction, and psychological evidence of depressive disorder dysthmia. The complainant requested $130,000 in compensatory damages, but the ALJ only awarded $45,000 for past and future emotional pain; $25,000 in a loss of professional reputation and $10,529.28 for past and future medical costs.

[22]The evidence established that complainant suffered from clinical, major depression require medication and therapy, in addition to suffering from frequent anxiety attacks.

reasonable it is to infer that a person would suffer emotional distress, and the more conclusory the evidence of emotional distress may be." **Id.** (**citing United States v. Balistrieri**, 981 F.2d 916, 932 (7th Cir. 1993)).

With these principles in mind, I will now consider the awards sought by Dr. Hall.

B. BACK PAY

With reference to the general issue of damages that may be awarded herein, Respondent submits, perhaps tongue-in-cheek, that "it is important to note that (Dr. Hall) was not fired. He was not demoted. He was not even disciplined. He merely retired. He has suffered none of the usual indicia of retaliation. The stress he complains of is most closely related to the fact that he was unable to complete timely his work assignment."

However, this closed record lends me to conclude otherwise, and I have already made these findings and conclusions above, based upon my interpretation of the evidence and based upon my conclusion that Dr. Hall is a credible witness and that any confusion as to the sequence of events is simply due to the passage of time and cumulative effects of the conspiracy against him at Dugway.

With reference to back pay, Dr. Hall seeks the following amounts calculated in this manner:

Dr. Hall's salary lost from 1996 to the end of 2001, estimated conservatively by presuming no appraisals above "fully successful" would have been received , and based on 1996 and 1997 earnings and leave statements, CX 127, RX 125, with cost of living adjustments approximately as shown on those statements, and including one GS-12 step increase that would have occurred during this period, would be as follows:

1996: $13,500.00
1997: $44,919.00
1998: $58,000.00
1999: $60,000.00
2000: $62,500.00
2001: $65,000.00
2002 (first half): $32,500.00

Total: $336,419.00

Note that in the amounts above Dr. Hall's current retirement

income of approximately $17,000 per year total has not been subtracted from the back pay amount requested above, for a reason. Dr. Hall is requesting the option of paying back the prior retirement and social security payments from the full back pay amounts to allow full reinstatement of Dr. Hall's retirement and social security accounts so that he can be placed back in the position he would have been in regarding retirement and social security. I agree as this request is most reasonable to restore Dr. Hall to the **status quo ante**.

According to the Respondent, Dr. Hall's estimate is grossly exaggerated and assumes that he could work full-time, 40 hours per week. Also, Dr. Hall has not subtracted his post-Dugway income.

However, I disagree because but for the actions of the Respondent and the conspiracy against him, Dr. Hall would have been able to work full-time and with the usual accommodations made to an employee by an employer who acts in good faith and is not motivated to retaliate because of protected activities.

Moreover, I find and conclude that Dr. Hall's earning in his last six-to-twelve months at Dugway are not representative of his wage-earning capacity because that is the period during which the full effects of the conspiracy became manifest, thereby resulting in his constructive termination by Respondent.

Respondent also submits that six years back pay is excessive and it should be three years, or until his 65th birthday.

No. I disagree - six years is reasonable and proper, especially as the federal government no longer has a mandatory retirement age, except for airline pilots, those in law enforcement and certain other specialized groups.

While Respondent posits that Dr. Hall has made no attempt to mitigate his damages, I disagree. Dr. Hall has looked for work but to no avail, partly because of the way that he was traumatized at Dugway by that conspiracy.

The "goal of back pay is to make the victim of discrimination whole and restore him [or her] to the position that he [or she] would have occupied in the absence of the unlawful discrimination." **Blackburn v. Martin**, 982 F.2d 125, 128 (4th Cir. 1992).

Complainant asserts that his request of $336,419.00 is based upon a straightforward calculation of the number of work days missed as a proximate result of Respondent's discriminatory conduct as a percentage of his annual salary. Complainant is correct to

note that any uncertainties with regard to the amount of back pay are to be resolved against the discriminating party. **McCafferty v. Centerior Energy**, 1996-ERA-6 (ARB Sept. 24, 1997).

Thus, based upon the totality of the record herein, I find and conclude that Complainant is entitled to an award of back pay totaling $336,419.00 as the methodology that he has used to establish that amount of reasonable and appropriate and in line with other cases under the Acts involved herein. I note that Dr. Hall has agreed to pay back "the prior retirement and social security payments from these back pay amounts to allow full reinstatement of Dr. Hall's retirement and social security accounts so that he can be placed back in the position he would have been in regarding retirement and social security." (CX A at pages 37-38)

C. OTHER DAMAGES

1. Compensatory Damages

As already noted above, compensatory damages sufficient to make the employee whole are provided for as well:

> The environmental statues, by authorizing an award of compensatory damages, have created a "species of tort liability" in favor of persons who are the objects of unlawful retaliation. Compensatory damages are designed to compensate complainants not only for direct pecuniary loss, but also for such harm as impairment of reputation, personal humiliation, and mental anguish and suffering. **Martin v. Dep't of the Army**, ARB Case No. 96-131, ALJ Case No. 96-131, ARB Dec. and Ord. (July 30, 1999) WL 702416 at *13, **citing Memphis Community Sch. Dist, v. Stachura**, 477 U.S. 299, 305-307 (1986). ...
>
> It is well-settled that expert medical evidence is not necessary to award compensatory damages for emotional distress. A complainant's credible testimony by itself is sufficient for this judge to find and conclude that emotional distress has resulted from a persistent pattern of retaliatory action and to award damages. **Jones v. EG&G Def. Materials Inc.**, ARB Case No. 97-129, ALJ Case No. 95-CAA-3 (ARB Sept. 29, 1998). In **Jones**, the testimony of the complainant alone was sufficient to sustain a $50,000 award for emotional distress. Similarly, complainant's testimony was sufficient to sustain a $20,000 emotional distress award in **Assist. Secretary of Labor for Occup. Safety & Healthy,**

Guaranteed Overnight Delivery, ARB Case No. 96-108, ALJ Case No. 95-STA-37 (Sept. 5, 1996).

Anderson v. Metro Wastewater Reclamation District, ARB No.: 98-087, Case No.: 1997-SDW-7 (ALJ RDO Sept. 18, 2001).

As I held in another decision:

> The general rule is that a wrongdoer is liable to the person injured in compensatory damages for all of the natural and direct or proximate consequences of his wrongful act or omission but he is not responsible for the remote consequences of his wrongful act or omission. Natural consequences are such as might reasonably have been foreseen, such as occur in an ordinary state of things. Thus, it is often said, if according to the usual experience of mankind the result was to be expected, it is not too remote.
>
> An act or omission is the proximate cause of a loss where there is no intervening, independent, culpable and controlling cause severing the connection between the wrongful act or omission and the claimed loss. Thus, an intermediate cause which, disconnected from the primary act or omission, produces the injury or loss will be regarded as the proximate cause. It is sufficient if it is established that the defendant's act produced or set in motion other agencies, which in turn produced or contributed to the final result. Moreover, although an act of the plaintiff has intervened between defendant's wrong and the injury suffered, the defendant is not thereby excused if the intervening act was the result of or was naturally and reasonably induced by his earlier wrong. While the plaintiff is not entitled to recover damages for conditions which are due entirely to a previous disease, the defendant may be liable for damages if his wrongful act aggravated or exacerbated such disease or impairment of health. Thus, the wrongdoer is not exonerated from liability if, by reason of some pre-existing condition, his victim is more susceptible to injury and the plaintiff may recover such damages as proximately result from the activation or aggravation of a dormant disease or condition. Heart disease was recognized as a pre-existing condition in **Firkol v. A.R. Glen Corp.**, 223 F. Supp. 163 (D.C.N.J. 1963). As between an innocent and a wrongful cause, the law uniformly regards the latter as the proximate and legally responsible cause. It is also well-settled that damages

> which are uncertain, contingent or speculative in their nature cannot be recovered as compensatory damages. Where a cause of action is complete and no subsequent action may be maintained, a recovery may be had for prospective and anticipated damages reasonably certain to accrue. Thus, damages are not restricted to the period ending with the institution of the suit and where it is established that there will be future effects sustained by the plaintiff as a result of the wrongful act or injury, damages for such effects may be awarded.

Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 (ALJ Sept. 1, 1994).

> Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment and humiliation. **See generally DeFord v. Secretary of Labor**, 700 F.2d 281, 283 (6th Cir. 1983)(decided pursuant to the ERA); **Nolan v. AC Express**, 1992-STA-37 (Sec'y Jan. 17, 1995)(decided pursuant to an analogous provision of the STA). Where appropriate, a complainant may recover an award for emotional distress when his or her mental anguish is the proximate result of respondent's unlawful discriminatory conduct. **See Bigham v. Guaranteed Overnight Delivery**, 1995-STA-37 (ALJ May, 8, 1996) (adopted by ARB Sept. 5, 1996); **Crow v. Noble Roman's Inc.**, 1995-CAA-8 (Sec'y Feb. 26, 1996). **See also Blackburn v. Metric Constructors, Inc.**, 1986-ERA-4 (Sec'y Oct. 30, 1991).
>
> Complainant bears the burden of proving the existence and magnitude of any such injuries; although, as a caveat, it should be noted that medical or psychiatric expert testimony on this point is not required. **Crow v. Noble Roman's, Inc.**, 1995-CAA-8 (Sec'y Feb. 26, 1996); **Lederhaus v. Paschen**, 1991-ERA-13 (Sec'y Oct. 26, 1992); **Jones v. EG&G Defense Materials, Inc.**, 1995-CAA-3 (ARB Sept. 29, 1998).

As I have also noted above, it is appropriate to review other types of wrongful termination cases, as well as awards in other whistleblower decisions involving emotional distress, to assist in the analysis of the appropriate measure of compensatory damages in a whistleblower case. Accordingly, this is precisely what this Judge has done. **See Crow v. Noble Roman's, Inc.**, 1995-CAA-8 (Sec'y Feb. 26, 1996)(approving an award of $10,000.00 in compensatory

damages);[23] **Creekmore v. ABB Power Sys. Energy Servs., Inc.**, 1993-ERA-24 (Dep. Sec'y Feb. 14, 1996) (wherein the Deputy Secretary upheld this ALJ's recommendation of $40,000.00 in compensatory damages);[24] **Gaballa v. Atlantic Group, Inc.**, 1994- ERA-9 (Sec'y Jan. 18, 1996)(wherein the Secretary reduced the ALJ's recommended compensatory damage award from $75,000.00 to $25,000.00);[25] **Smith v. Littenberg**, 992-ERA-52 (Sec'y Sept. 6, 1995) (wherein the Secretary affirmed the ALJ's award of $10,000.00);[26] **Blackburn v. Metric Constructors, Inc.**, 86-ERA-4 (Sec'y Aug. 16, 1993) (wherein the Secretary reduced the ALJ's recommended award of compensatory damages to $5,000.00);[27] **Lederhaus v. Paschen**, 1991-

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[34]The evidence which supported an award in this amount consisted of complainant's consulting physicians who prescribed anxiety and depression medications, as well as other medications for chest pain; a treating psychologist testified that respondent's discriminatory acts caused complainant's anxiety disorder and post-traumatic stress disorder and respondent failed to offer any countervailing evidence on causation; and that same psychologist testified complainant's wife and children noticed a radical change in complainant's behavior, a serious strain in the marital relationship, and that divorce proceedings were begun, although the couple did eventually reconcile.

[35]At the hearing, the complainant testified to his lowered self-esteem and uncommunicativeness, to his change in sleep and eating habits, and to the adverse effect on his marriage. He also testified that he was not interested in socializing, felt 'less than a man' because he could not support his family, and that the family experienced a sparse Christmas. Finally, complainant testified the family had to cancel their annual summer vacation and charge the credit cards to the limit. Complainant's wife testified she noticed complainant's withdrawal in the weeks after Christmas.

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As I stated more recently in another decision, and it is equally applicable herein, I find that Complainant has submitted sufficient evidence justifying a claim for compensatory damages based on her severe emotional pain and suffering cause by Respondent's discriminatory conduct. Complainant has testified

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[37]The evidence established severe emotional pain and suffering. Further the complainant suffered from anxiety attacks, shortness of breath and dizziness caused on the work-related stress. The complainant also submitted evidence of marital friction, and psychological evidence of depressive disorder dysthmia. The complainant requested $130,000 in compensatory damages, but the ALJ only awarded $45,000 for past and future emotional pain; $25,000 in a loss of professional reputation and $10,529.28 for past and future medical costs.

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concerning how, as a result of RIDEM's alleged discrimination and harassment, she has suffered substantial emotional, physical and professional harm. (TR 381-93) Additionally, Complainant has submitted medical records from Nephrology Associates, Harvard Pilgrim Healthcare, the RIDEM Medical Monitoring Program, and the RI EAP, to substantiate her claim. (CX 36-39) These records reflect a two year period of Complainant's suffering from severe stress, sleep disorders, anxiety and symptoms of clinical depression. (CX 36-39) The records of Dr. Stephen Zipin indicate serious stress disorder and problems during 1996 through 1998. (CX 36; CX 62; CX 64; CX 65; CX 67) Further, in late 1997, Complainant met with Counselor Raymond Cooney, and psychiatrist Dr. Giselle Corre, both of whom noted the "severe stress from work-related issues," and recommend that Complainant take time off from work on stress leave. (CX 61) As a result, Complainant then took five weeks of stress leave in September and October of 1997, as well as other occasional days off. (TR 387) Complainant also alleges that she has been emotionally strained, and that her family has been severely impacted by her stress. In fact, her husband, Joseph Migliore, relayed his concern about Complainant's stress and its effect on their family to Mr. Fester who shared this information with Ms. Marcaccio.

Likewise, what I wrote earlier applies herein. I find and conclude that Complainant has suffered over two years of continuous and severe harassment by Respondents. I reject Respondent's argument that Complainant's stress over the reorganization is unrelated to this current claim. Rather, I have previously held that Complainant began engaging in protected activity, for the purposes of these claims, in mid-1996 when she was voicing her concerns about the negative effects of the reorganization and her reassignment. I also have found that Respondent's retaliatory actions, in the form of harassment, began at this time. Complainant's supervisors were aware that Complainant was being subject to a great deal of stress by their actions, yet the discrimination and retaliation continued, through undermining her authority, subjecting her to disciplinary actions, and threatening her with future retaliation for engaging in protected activity. I also reject Respondent's argument that it helped Complainant's stress, by referring her to the EAP. While it is true that Ms. Marcaccio did refer Complainant based upon her alleged concern for Complainant's mental health, Ms. Marcaccio also provided the EAP with negative information stemming from Complainant's protected activity.

Accordingly, in the case at bar, I find and conclude that Complainant has submitted a well-documented and well-supported claim for compensatory benefits based on emotional distress. I also

note, in comparison with similarly situated cases, that Respondent's awareness of Complainant's stress disorder and anxiety, make their actions particularly offensive. I also find that the medical record documentation presented, coupled with Complainant's credible testimony, presents one of the strongest cases for compensatory damages I have ever seen. Therefore, I find and conclude that Complainant is entitled to $300,000.00 in compensatory damages based upon his claim of emotional distress.

2. Adverse Physical Health Consequences

In the case at bar, Complainant is seeking $75,000 in compensatory damages based upon his adverse physical health consequences directly caused by Respondent's discriminatory conduct. Respondent, on the other hand, argues that Complainant has failed to present sufficient evidence to document his claim.

I note that in **Varnadore v. Oak Ridge Nat'l Laboratory,** 1992-CAA-2/5 and 1993-CAA-1 (ALJ June 7, 1993), the Administrative Law Judge found that the complainant was not entitled to an award of compensatory damages based upon adverse health consequences where the Complainant's evidence was merely speculative.

I find and conclude, that upon review of the evidence, Complainant has more than adequately proved that he has suffered physical consequences as a result of Respondent's actions, and that such actions have resulted in his worsening medical condition. I find that Complainant has candidly and honestly testified to his emotional stress that he has experienced since he began to work at Dugway. Complainant credibly testified that his physical health condition has worsened that he has suffered additionally as the direct result of his work-related stress. Accordingly, I find that Complainant's physical condition, as impacted by the her work-related stress and anxiety, is well documented in the medical records of Dr. Tedrow and Dr. Christie.

Accordingly, based upon the medical records submitted, coupled with Complainant's testimony, I find that Complainant is entitled to compensatory damages based on his adverse health condition. Further, after a comparison of these facts to other whistleblower cases involving compensatory damages based on adverse medical conditions, I find and conclude that Complainant is entitled to an award of $50,000.00 as a more reasonable amount.

3. Loss of Career Opportunities and Professional Reputation

Complainant is seeking $250,000.00 compensatory damages based upon his loss of career opportunities and professional reputation directly caused by Respondent's discriminatory conduct. Complainant alleges that his professional reputation has been irreparably harmed by Respondent's actions of 'bad-mouthing' him to individuals both inside and outside Dugway. Complainant stresses that this action is particularly damaging in light of his professional circumstances: mainly, he has a very narrow career specialty, and that his physical and family limitations require him to stay in Utah. Complainant alleges that his career is ruined and that he no longer is able to work in that field. Respondent, however, argues that Complainant's reputation has not suffered and that he can still work elsewhere.

I find Complainant's situation most compelling on the grounds that his professional reputation has been repeatedly and severely tarnished by Respondent's retaliatory actions. Further, I find and conclude that the facts of this case are much more severe than any other whistleblower case to date over which I have presided.

As already noted above, in **Van Der Meer v. Western Kentucky Univ.**, 1995-ERA-38 (ARB Apr. 20, 1998), the ARB awarded a complainant $40,000.00 in compensatory damages for loss of professional reputation where Complainant was "physically escorted from his classroom by the campus police, in front of his students, and then hustled through gathering up some personal effects from his office under the watchful eye of the police." The Board found that the extraordinary and very public action against the complainant "surely had a negative impact on [the complainant's] reputation among the students, faculty and staff at the school, and more generally in the local community."

I find that Complainant's reputation has suffered severely at the hand's of Dugway. Complainant has been criticized directly, and through veiled, posted memoranda, in front of his staff. His reputation among his Dugway superiors is ruined. He has repeatedly been criticized openly to both outside entities contracting with Dugway, as well as, and most significantly, Utah state officials. All of these actions serve to severely curtail Complainant's chance of obtaining comparable work in the chemical/chemist community.

I find it terribly unfortunate that Complainant's professional reputation could become so scarred, merely for raising safety and environmental concerns. I recognize that the posting of this decision, as shall be addressed below, will go to some length to try to resurrect Complainant's tarnished reputation. Nevertheless, I find and conclude that Respondent's actions have been so egregious in ruining Complainant's reputation among other Dugway

employees, undermining his situation, and discrediting him with outside agencies, that Complainant is entitled to significant compensatory damages for his loss of reputation.

Accordingly, upon my review of relevant case law and the facts of this matter, I find and conclude that Complainant is entitled to an award of $100,000.00 in compensatory damages based upon damage to his professional reputation.

As has been held in other cases:

> **Martin v. The Department of Army**, 1993-SDW-1 (ARB July 30, 1999) (wherein the ARB awarded $75,000.00 in compensatory damages for emotional distress); **Jones v. EG&G Defense Materials, Inc.**, 1995-CAA-3 (ARB Sept. 29, 1998)(wherein Board adopted ALJ's award of $50,000.00); **Smith v. Esicorp, Inc.**, 1993-ERA-16 (ARB Aug. 27, 1998) (wherein the Board reduced the ALJ's recommendation of $100,000.00 in compensatory damages to $20,000.00); **Michaud v. BSP Transport, Inc.**, 1995- STA-29 (ARB Oct. 9, 1997) (wherein the Board approved an award of $75,000.00 in compensatory damages); **Leveille v. New York Air Nat'l Guard**, 1994-TSC-3/4 (ALJ Feb. 9, 1998) (wherein ALJ awarded over $80,000.00 in compensatory damages based upon past and future emotional stress, past and future medical expenses, and damage to professional reputation); **Berkman v. United States Coast Guard Academy**, 1997-CAA-2/9 (ALJ Jan. 2, 1998) (wherein the ALJ awarded $70,000.00 in compensatory damages).
>
> In **Smith v. Esicorp, Inc.**, 1993-ERA-16 (ARB Aug. 27, 1998), the ARB noted that, "The severity of the retaliation suffered by [a complainant] is also relevant to our determination of appropriate compensatory damages. The courts have held that the more inherently humiliating and degrading the defendant's action, the more reasonable it is to infer that a person would suffer emotional distress, and the more conclusory the evidence of emotional distress may be." **Id.** (citing **United States v. Balistrieri**, 981 F.2d 916, 932 (7th Cir. 1993)).

Migliore v. Rhode Island Department of Environmental Management, 1998-SWD-3, 1999-SWD-1, 1999-SWD-2 (ALJ RDO August 13, 1999).

While the Respondent submits that it is not responsible for Dr. Hall's pre-existing psychological problems, it is well to keep in mind that the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation

purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when Complainant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

On the basis of the totality of this record, I find and conclude that Dugway's constructive discharge and the disparate treatment of Dr. Hall, and the resulting emotional stress thereafter directly caused his forced retirement on June 12, 1997. Complainant apparently was a cardiac risk as perhaps a "Type A" individual and it is well settled that the employer takes each employee "as is" and with all of his/her human frailties. In this regard, **see, e.g., Wheatley v. Adler**, 407 F.2d 307 (D.C. Cir. 1968); **Vandenberg v. Leicht Material Handling Co.**, 11 BRBS 164, 169 (1979).

In this regard, **see Creekmore v. ABB Power Systems Energy Services, Inc.**, 93-ERA-24 (ALJ Sept. 1, 1994).

In **Migliore** this Administrative Law Judge wrote, "Initially, I note that the stress leave, while occurring more than thirty (30) days prior to the filing of the first complaint, was the result of a seamless web of retaliation and discrimination that caused the emotional stress to Complainant. Further, I find and conclude that Complainant's five-weeks of stress leave were a direct consequence of Respondent's discriminatory conduct, and as such, is compensable as back pay." **Migliore**. Similar to this Administrative Law Judge's findings in **Migliore**, here the record reflects a multi-year period of Complainant's suffering from severe stress, sleep disorders, anxiety and related problems. The records of Dr. Hall's doctors and counselors indicate serious stress disorder and problems during and after the acts of retaliation. Dr. Hall sought professional counseling and Dr.

Tedrow and Dr. Christie noted that Dr. Hall was suffering severe stress from work-related issues and recommended that Complainant remove himself from the stressful work environment or face even more severe consequences to his physical and mental health.

Accordingly, I find and conclude that Complainant is entitled to compensatory damages totaling $400,000, based upon his mental anguish, adverse health consequence, and damage to his professional reputation. I note that this award is higher than any other award previously awarded by this Administrative Law Judge, however, I base my decision on my finding that this case presents a factually scenario so severe as to warrant significant compensatory relief. This Judge has concluded that Complainant has presented a most compelling case of repeated and continuous discrimination and retaliation that has resulted in Complainant suffering greatly at the hands of Dugway, most particularly his mental health has been compromised, and his professional reputation has been destroyed, perhaps forever.

Dr. Hall also seeks awards for the following items because of the Respondent's persistent pattern of retaliation, discrimination and disparate treatment as demonstrated above:

4. Federal Thrift Savings Plan Loss Due to Premature Withdrawal in 1997 to Year 2001

Complainant submits that the estimated loss from early withdrawal from the thrift savings plan (TSP) is calculated as approximately $100,000.00. The account was showing about $10,000 growth per year as of 1996. As a result of this amount of growth, it is estimated that the amount in the plan as of 1997, when Dr. Hall was forced to withdraw it, which was $74,500, would have grown to approximately double by end of year 2001. **See** CX 128. The account was getting large enough by the time Dr. Hall had to withdraw it in July, 1997 that interest and dividends alone were causing rapid increases in the total amount beyond what Dr. Hall's contributions (10%) and the government contributions (5-6%) to the plan were each year.

With reference to this alleged loss, Dr. Hall seeks to be doubly compensated, based upon a fanciful and unsupported argument, completely devoid of any legal authority, according to the Respondent.

I disagree. Dr. Hall was forced to withdraw his TSP funds prematurely as a lump sum in 1997 not to engage in profligate living. He needed that money to pay his daily living expenses and

other bills just to be able to exist. His forced and premature retirement greatly and quickly depleted his income and assets to such an extent that he, as a Ph.D. Chemist, is now forced to live, not in an elegant community in Salt Lake City or in the nearby foot-hills, but in subsidized elderly housing. Why? Because of that conspiracy against him at Dugway.

Respondent's actions have brought about this situation and any inexactitude in determining a reasonable amount for this loss must be borne by the Respondent because of its actions against Dr. Hall for many years.

Accordingly, in view of the foregoing, I find and conclude that Complainant is entitled to the requested amount of $100,000.00 as the methodology that he has utilized to establish that amount is reasonable and proper, especially as that loss is directly related to the conspiracy against him.

5. Tax Losses

An amount of damages is requested by Dr. Hall for the financial impact of higher tax rates that result from lump sum income that otherwise would have been spread over several years. This loss is estimated to be $30,000. Respondent suggests that this amount not be awarded as Dr. Hall has not substantiated this alleged tax loss. I disagree as that loss is directly related to the Respondent's actions herein, the methodology used is reasonable and proper and any inexactitude must be borne by the Respondent.

6. Reduction in Retirement Benefits Due to Early Retirement

Dr. Hall was forced to retire early resulting in lower retirement and social security payments. Dr. Hall is requesting an amount of $50,000 in compensation for this loss or, alternatively, to be reinstated with appropriate seniority and back contributions so that his retirement would be what it would have been.

According to the Respondent, Dr. Hall requests yet another windfall as an award of back pay would fully compensate him for whatever amount he might wish to "pay back" to any retirement plan or other investment plan.

I disagree as this reduction is causally related to Respondent's actions herein, the methodology utilized is reasonable and proper and any inexactitude must be borne by Respondent.

Accordingly, Complainant is awarded that amount.

7. Economic Loss Due to Bankruptcy and Damage to Credit Record

Dr. Hall was forced into bankruptcy as a result of his forced early retirement and has suffered damage to his credit record as a result. Dr. Hall requests $50,000 in compensation for this loss.

Respondent posits that Dr. Hall has not proven these alleged losses - - and damage to his credit - - and that he became bankrupt due to his profligacy and excessive health-related debt.

I disagree as the sudden loss of his employment placed him in a precarious situation and his limited retirement benefits forced him into bankruptcy, a bankruptcy directly caused by the Respondent's actions against Dr. Hall.

As the methodology used by Dr. Hall is both reasonable and proper, and as any inexactitude must be borne by the Respondent, I award Dr. Hall the requested amount of $50,000.00.

8. Costs of Counseling and Stress Related Treatment

Dr. Hall submits that he has incurred and will incur additional expenses for professional treatment and counseling to deal with stress related problems resulting from the hostile work environment, which expenses are estimated at $10,000.00. Respondent submits that this item has not been substantiated.

I disagree. These expenses are directly related to Respondent's actions herein and the amount requested is fair and reasonable. Accordingly, Dr. Hall is awarded that amount.

E. REINSTATEMENT VERSUS FRONT PAY

While Complainant requests front pay in lieu of reinstatement due to the hostile work environment, as well as the uncertainty regarding the availability of a suitable position for Dr. Hall currently at Dugway, the difficulty in reestablishing working relationships at Dugway, and the likely additional stress and harm to Dr. Hall's health that might result from an attempt to make reinstatement work, Dr. Hall wishes to make clear that he would not refuse reinstatement if ordered and would act in good faith to make

the situation work. In regard to the calculation of the amount of front pay, Dr. Hall's age and health, as well as the specialized area in which he worked (chemistry of chemical warfare agents) should be taken into consideration. Under the circumstances, it is not realistic to expect Dr. Hall to earn more than his retirement income absent reinstatement to his former position at Dugway.

This case presents the issue as to what is the appropriate amount of time for this Administrative Law Judge to award front pay as an alternate remedy to reinstatement in whistleblower cases.

Our research reflects that the ARB has upheld an award of front pay (discounted to present value) where the administrative law judge has based the award on findings of how long it will take the complainant to be rehabilitated to an employable condition or to obtain work commensurate with the form position. In **Berkman v. U.S. Coast Guard Academy, infra**, the ARB reversed an award of front pay for one year because it was based on stale evidence from a psychologist, which was more than two years old, that the complainant would be able to be reinstated within one year, and directed the ALJ to make findings on when the complainant could be reinstated or obtain other work commensurate with the former position. In **Doyle v. Hydro Nuclear Services, infra**, the ARB ordered front pay for five years based on psychological evidence that the complainant would be employable in the next five years. In **Michaud v. BSP Transport, Inc., infra**, the ARB held that the complainant was entitled to two years of front pay based on medical expert testimony that it would take two years to rehabilitate the complainant to an employable condition.

In **Berkman v. U.S. Coast Guard Academy**, ARB No. 98-956, ALJ No. 1997-CAA02 and 9 (ARB Feb. 29, 2000), the ARB declined to adopt the ALJ's finding that Complainant will be able to return to work one year from the final judgment because the evidence on Complainant's current ability to work was over two years old and had become stale. Thus, the case was remanded with instructions to take evidence and made a supplemental recommended decision on this issue. The case was subsequently settled on remand to this Judge.

The ARB noted that front pay may be used as a substitute when reinstatement is not possible for some reason, and ordered that, if on remand the ALJ determines that Complainant's medical condition will permit reinstatement, but at a future tie, the Alj shall order front pay for the period until reinstatement is possible. On the other hand, if the ALJ finds that Complainant will not be able to be reinstated s Respondent's environmental engineer, he shall order payment of front pay for the period until Complainant is able to obtain other work commensurate with that position.

In **Doyle v. Hydro Nuclear Services**, 89-ERA-22 (ARB Sept. 6, 1996), reinstatement of Complainant was not practical due to a corporate reorganization, so Complainant was entitled to front pay. The Board rejected the ALJ's reasoning that five years of front pay was appropriate due to Complainant's age of forty years. Rather, the Board determined that five years of front pay was reasonable based on a psychologist's testimony indicating that Complainant was not likely to find permanent employment in the next five years. Five years was estimated to be the amount of time necessary to make Complainant employable again through psychotherapy, training and education.

The Board held that front pay is calculated by determining the present value of the future earnings that a complainant would have earned, and then subtracting the anticipated future earnings. In addition, the Board held that it is necessary to determine the present value of both income streams using an appropriate discount rate. The Board did not suggest an appropriate discount rate, but requested that the parties to agree to such; if no agreement can be reached, a remand to the ALJ was anticipated.

In **Michaud v. BSP Transport, Inc.**, 95-STA-29 (ARB Oct. 9, 1997), **rev'd BSP Transport, Inc. v. U.S. Department of Labor**, 160 F.3d 38 (1st Cir. 1998)(reversing finding that complainant engaged in protected activity and directing dismissal of complaint), the ARB held that Complainant had reasonably rejected a **bona fide** offer of reinstatement because of his depression, and therefore Respondent was subject to front pay liability. The ARB held that the back pay liability ended on the date of the **bona fide** offer. Front pay liability began on the date the hearing closed and was to last two years from that date, and was to be measured the same as back pay.

The ARB made the front pay calculation based on the hearing testimony of a medical expert that it would take two years to rehabilitate Complainant to the point where he could work again. The ALJ had concluded that front pay liability would begin on the date when Respondent paid the damages already due Complainant; the ARB, however, found that the appropriate date was the time that the medical opinion was given.

The ARB held that future damages should be discounted to present value. In the instant case, however, since only a few months would elapse between the date of its final order and the end of the front pay period, no reduction to present value was ordered.

Reinstatement or, alternatively front pay, is also provided for:

> Thus, the remedy for discrimination against whistleblowing must "provide concrete evidence to other employees that the legal protections of the whistleblower statutes are real and effective." **Hobby** at 7. As the Sixth Circuit observed in considering whether an unlawfully demoted school employee should be reinstated in his former position:
>
> If the employer is allowed to redress his violation of an employee's First Amendment rights through mere money damages, the message to other employees is that they may lose their jobs if they speak out against their employer[.] The prospect of money damages will not be sufficient for many employees to overcome the otherwise chilling effect that accompanies the threat of termination. Moreover, employment, especially in a career such as education, is more than a way to make money, it is profession with significant non-monetary rewards. For such professions, money damages may be hollow victory.
>
> **Banks v. Burkich**, 788 F.2d 1161, 1164 (6th Cir. 1986) (employee unlawfully demoted for protected free speech; reinstatement proper even if replacement has to be bumped); **see also, e.g. Lee v. Macon Cty. Bd. of Edu.**, 453 F.2d 1104, 1109 (5th Cir. 1971) ("The real gist of demotion is a reduction in responsibility, not in salary.")

Moder v. Village of Jackson, Wisconsin, 2000-WPC-0005 (ALJ Aug. 10, 2001).

> The trial court, in its discretion, may grant front pay in lieu of reinstatement where appropriate facts exist. **Mitchell v. Robert Demario Jewelry, Inc.**, 361 U.S. 288 at 291, 4 L.Ed.2d 23, 80 S.Ct. 332 (1960). Victims of retaliatory discharges in violation of public policy should be allowed to receive front pay in lieu of reinstatement. **Goins v. Ford Motor Company**, 131 Michigan App. 185 (1983). To determine future lost wages, the court may review the employee's past employment history and the regularity of any wage increases which he can project forward.

Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 (ALJ Sept. 1, 1994).

> Dr. Hall originally testified that he was seeking

reinstatement to his full former duties. In his post-hearing brief, however, Complainant notes that he no longer seeks reinstatement with Dugway. Following this lengthy and contentious hearing, Complainant concludes that the retaliatory animus pervades his entire chain-of-command, and that restoration to his former duties and position would not be reasonable.

I note that the Secretary of Labor has held that when a complainant states at a hearing that reinstatement is not sought, the parties or this Administrative Law Judge should inquire to why. If there is hostility between the parties and reinstatement would not be wise because of the irreparable damage to the employment relationship, the administrative law judge may decide to reject reinstatement and order front pay. If, however, the complainant provides no strong reason for not returning to his or her former position, reinstatement should be ordered. If reinstatement is ordered, the respondent's back pay liability terminates upon the tendering of a bona fide offer of reinstatement, even if the complainant declines the offer. **See West v. Sys. Applications Int'l**, 1994-CAA-15 (Sec'y, Apr. 19, 1995); **Dutile v. Tighe Trucking Co**., 1993-STA-1 (Sec'y, Oct. 31, 1994)(a matter over which this ALJ presided).

On the basis of the totality of this record, I also find that the working relationship between Complainant and Dugway has deteriorated long beyond the point of reconciliation. Dugway employees have continually discriminated against Complainant for almost ten (10) years, and they have tarnished her professional reputation. This Judge presided over fifty-seven (57) days of hearings herein and it is readily apparent, even to the casual reader of these transcripts, that the employment relationship between Complainant and Dugway long ago reached the point of no return and that Complainant's supervisors manifested such blatant hostility towards him for not being a "team player." Such hostility was readily apparent in the courtroom as each witness testified against Complainant, several not even looking in his direction, except when absolutely necessary. Complainant, in my judgement, cannot return to work at Dugway. Therefore, I find and conclude that reinstatement of Complainant to his prior duties is not advisable. Accordingly, I find and conclude that an award of front pay is justified in this matter.

As I have already held in **Migliore v. Rhode Island Department of Environmental Management**, 1998-SWD-3, 1999-SWD-1, 1999-SWD-2 (ALJ RDO August 13, 1999),

> An award of front pay is calculated by determining the present value of the future earnings that a complainant

would have earned, and then subtracting the anticipated future earnings. **See Doyle v. Hydro Nuclear Serv.**, 1989-ERA-22 (ARB Sept. 6, 1996).

Complainant requests front pay in lieu of reinstatement due to the hostile work environment, uncertainty regarding the availability of a suitable position for Dr. Hall currently at Dugway, the difficulty in reestablishing working relationships at Dugway, and the likely additional stress and harm to Dr. Hall's health that might result from an attempt to make reinstatement work. The difference between Dr. Hall's current retirement income and his prior salary with normal increases is requested as front pay for the period of time he reasonably might have continued to work and earn a salary at Dugway which period is estimated as ten years. This front pay amount would be approximately $500,000.

With reference to this award of front pay, Respondent submits that Dr. Hall requests front pay in lieu of reinstatement to his prior position at Dugway. Dr. Hall offers not the slightest evidence to support his wildly enthusiastic estimate of ten (10) years of full-time employment beyond his 67th birthday. This uncertainty renders a damage award for front pay merely speculative. **See Wolf v. City of Wichita**, 883 F.2d 842 (10th Cir. 1989).

I disagree for the following reasons.

As I stated in another decision:

> In the present case, I find and conclude that Complainant's "transfer" in the fall of 1998 was discriminatory as a method to both retaliate against Complainant, and to remove her from a position where she could raise concerns about the RCRA program. Further, I find and conclude that Complainant, while retaining her former salary and position level, is, in actuality, performing menial tasks for a person of her expertise. I also find that the working relationship between Complainant and RIDEM has deteriorated long beyond the point of reconciliation. RIDEM employees have continually discriminated against Complainant for over two years, and they have tarnished her professional reputation. This Judge presided over twenty-three (23) days of hearings herein and it is readily apparent, even to the casual reader of the transcripts, that the employment relationship between Complainant and RIDEM long ago reached the point of no return and that Complainant's supervisors manifested such blatant hostility towards her

> for not being a 'team player.' Such hostility was readily apparent in the courtroom as each witness testified against Complainant, several not even looking in her direction, except when absolutely necessary. Complainant, in my judgement, cannot return to work at RIDEM. Therefore, I find and conclude that reinstatement of Complainant to her prior duties is not advisable. Accordingly, I find and conclude that an award of front pay if justified in this matter, once Complainant leaves her employment with RIDEM, and she has indicated in her post-hearing brief that she will shortly do so.

In **Migliore**, I stated:

> An award of front pay is calculated by determining the present value of the future earnings that a complainant would have earned, and then subtracting the anticipated future earnings. **See Doyle v. Hydro Nuclear Serv.**, 1989-ERA-22 (ARB Sept. 6, 1996). In the present case, Complainant has alleged that her salary and benefits for two years total $150,000.00. Respondent, while challenging this figure, has presented no evidence or testimony to contradict this Complainant's proposed rate. Further, Respondent has not submitted any evidence to justify an offsetting amount of future earnings for Complainant. Therefore, I find and conclude that Complainant is entitled to an award of front pay of $150,000.00, upon her resignation from RIDEM.

As noted above, I have rejected reinstatement as a remedy herein and Respondent agrees as follows:

> "Because of Complainant's inability to serve in his previous Dugway position, reinstatement would be inadvisable."

I agree completely, but not for the reasons alluded to be Respondent.

Accordingly, in view of the foregoing, I find and conclude that three (3) years is a reasonable time period for front pay and that Dr. Hall shall be awarded the amount of $150,000.009 as front pay.

D. EXEMPLARY AND PUNITIVE DAMAGES

I must begin by noting that punitive damages are not

allowable, absent express statutory authorization, in whistleblower cases, and that the SWDA whistleblower provision does provide for such damages. **See** 42 U.S.C. §§ 6971. Further, an ERA complainant may not attempt to sneak a punitive award through the wooden horse of compensatory damages. **Cf. Smith v. Esicorp, Inc.**, 1993-ERA-16 (ARB Aug. 27, 1998).[39] Complainant's request of $3 million in compensatory damages is astronomical, unsupportable, and essentially, a request for punitive damages that must, and hereby is, denied. That said, in the case at bar, Complainant has presented a compelling case for the award of appropriate compensatory damages, albeit at a more reasonable amount than requested, as shall now be discussed.

The SDWA provides for exemplary damages and the extreme facts of this case, as in those below where such damages were awarded, warrants such an award. The facts discussed in the Findings of Fact **supra** regarding both the pattern of blatant actions taken against Dr. Hall, and others including Judy Moran and Dr. Harvey, and the blatant direct evidence of Dugway's retaliatory motive for a ten year period, make clear that Dugway did not stumble into this discrimination accidentally. Dugway knowingly and in blatant disregard of Dr. Hall's rights under federal law took a series of actions intended to force Dr. Hall to resign and abandon his protected activities even if this resignation and abandonment came at the expense of Dr. Hall's mental and physical health, and the professional careers of others such as Dr. Harvey. Dugway has been aware of Dr. Hall's rights at least since the 1991 statement by Hall's supervisor Colonel Ertwine that Hall's transfer to JOD must not appear to have been in retaliation for Hall's whistleblowing.

Dugway's conduct in this matter, particularly given that Dugway as a government agency should set an example of compliance with the law, and given the extremely dangerous chemical and biological warfare materials with which Dugway works, is offensive and shocks the conscience. Many of the issues Dr. Hall raised such as the defective gas mask to be used in the Gulf War, the presence of chemical warfare agents at old uncontrolled dump sites, inadequate decontamination of agent contaminated materials such that they still pose a skin contact hazard, and defective devices for diagnosing contents of recovered chemical munitions, to name a few, involve real dangers to real people, dangers that Dugway was willing to sweep under the rug for its own convenience and benefit.

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[39]I noted that the facts in the **Smith** more clearly showed an intent to award large compensatory damages in order to "send a message." **Id.** In the present case, Complainant has not expressly requested compensatory damages for any other reasons than to compensate him for his losses directly due to Respondent's egregious actions herein.

Under the applicable law, an award of exemplary and punitive damages to deter such future conduct is appropriate and required. Dugway has clearly engaged in such retaliation against other employees since Dr. Hall (**e.g.** Judy Moran), and given its scorched-earth resource-exhausting tactics in this case and insistence on reasserting offensive unfounded accusations against Dr. Hall knowing his level of stress and health during trial, there is no reason to believe Dugway will mend its ways absent an award of exemplary and punitive damages, and I so find and conclude

As noted above, the employee protection provisions of the Safe Drinking Water Act [42 U.S.C. §300j-9(i)(2)(B)(ii), and of the Toxic Substances Control Act (15 U.S.C. §2622(b)(2)(B)], which contain specific statutory language giving the Department of Labor the authority to award exemplary or punitive damages in appropriate situation. **See, e.g., Davis v. Hill, Inc.**, No. 86-STA-18, recommended Decision and Order of the Administrative Law Judge at 7 (May 20, 1987), adopted by the Secretary of Labor (July 14, 1987). **See generally Corpus Juris Secundum**, 25 C.J.S., **Compensatory Damages**, §§17-49.

Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 (ALJ Sept. 1, 1994).

> As I wrote in another context:
>
> > Two of the environmental statutes under which Ms. Anderson's additional complaints arise - the Toxic Substances Act, 15 U.S.C. §2622(b), and the Safe Drinking Water Act, 42 U.S.C. §300j-9(i)(2)(B)(ii) - explicitly permit "where appropriate, exemplary damages." Punitive damages may be awarded to punish "unlawful conduct" and to deter its "repetition." **BMW v. Gore**, 517 U.S. 559, 568 (1996). The Secretary of Labor has held that exemplary damages are appropriate under certain environmental whistleblower statutes in order to punish an employee for wanton or reckless conduct and to deter such conduct in the future. **Johnson v. Old Dominion Security**, 86-CAA-3/4/5, (Sec'y May 29, 1991). The Secretary explained:
> >
> > "The threshold inquiry centers on the wrongdoer's state of mind: did the wrongdoer demonstrate reckless or callous indifference to the legally protected rights of others, and did the wrongdoer engage in conscious action in deliberate disregard of those rights? The 'state of mind' thus is comprised both of intent and the resolve actually to take action to effect harm. If this state of

> mind is present, the inquiry proceeds to whether an award is necessary for deterrence." **Id**. at 29, citing the Restatement (Second) of Torts, §908 (1979). **Accord, Pogue v. United States Dept. of the Navy**, 87-ERA-21, (**D&O on Remand Sec'y** April 14, 1994).
>
> An award of punitive damages is appropriate where "the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." **Smith v. Wade**, 461 U.S. 30, 56 (1983). Once the requisite state of mind has been found, the "trier of fact has the discretion to determine whether punitive damages are necessary, 'to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.'" **Rowlett v. Anheuser-Busch, Inc.**, 832 F.2d 194, 205 (1st Cir. 1987). The appropriate standard to use in determining the amount of exemplary damages is the amount necessary to punish and deter the reprehensible conduct. **CEH, Inc. v. F/V Seafarer**, 70 F.3d 694, 705-6 (1st Cir. 1995); **Ruud v. Westinghouse Hanford Co**., 88-ERA-33 (ALJ Mar. 15, 1996).

Anderson v. Metro Wastewater Reclamation District, ARB No.: 98-087, Case No.: 1997-SDW-7 (ALJ RDO Sept. 18, 2001). As I wrote in **Anderson**:

> The record is replete with evidence of outrageous, hostile, disparate, discriminatory and egregious behavior by Metro against Ms. Anderson, with continuing and even escalating retaliation and other violations of law while on express notice of the illegality of their actions, especially after the filing of the May 2, 1997 complaint herein and the ARB's decision. Such clear evidence of defamatory and discriminatory conduct, and Respondent's evident cavalier attitude towards its conduct, justifies an award of exemplary damages ... .

Id.

> The Respondent shall pay to Complainant the amount of $150,000.00 as compensatory damages for the injury to her professional reputation and loss of future income caused by the Respondent's continuing egregious, disparate and discriminatory treatment. The Respondent shall also pay to the Complainant the amount of $150,000.00 as exemplary or punitive damages because of the Respondent's willful, wanton and reckless conduct, and to serve as a deterrent

> to Respondent and others in the future. The Respondent shall also pay to the Complainant the amount of $125,000.00 for the mental anguish, emotional distress and severe depression caused by Respondent's continued egregious, discriminatory and disparate retaliation against Complainant for the past five years at least.

(**Id.**)

Dr. Hall has requested an award in this case in an amount of at least $500,000 in order to have a deterrent and punitive effect on Respondent, a large government military agency, and other similar large agencies and corporate employers who may be tempted to engage in similar conduct.

However, the Respondent submits that the decision whether to award punitive damages involves a discretionary moral judgment. **Sixth v. Wade**, 461 U.S. 30, 52 (1983). **Silkwood v. Kerr - McGee Corp.**, 769 F.2d 1451, 1461 (10th Cir. 1985). Moreover, an award of punitive damages is necessary only when the sanctioned conduct is motivated by evil motive or intent or when it involves reckless or callous indifference to the federally protected rights of others. **Smith, supra** at 56. **See also Wren v. Spurlock**, 798 F.2d 1313, 1322 (10th Cir. 1986). Furthermore, Dr. Hall has not established that Dugway's actions were intentional or resulted from a black-hearted motive and exhibit the necessary intent needed to justify this award.

I disagree. The case before me involves an egregious and blatant conspiracy against Dr. Hall by the Respondent, a conspiracy that lasted approximately ten (10) years.

It is now well-settled that punitive, or exemplary, damages are specifically available under the SDWA and TSCA[40] "where appropriate." I also reject the Employer's argument that Dr. Hall has not cited any persuasive authority that Congress has waived the sovereign immunity of the Army and/or Dugway with regard to exemplary damages. As noted, **Berkman** dealt with this issue in a case against the U.S. Coast Guard Academy.

Consistent with the cases above, an award of exemplary and punitive damages is appropriate here. Given recent events, if there ever is a time when slack enforcement at chemical and biological warfare facilities is appropriate, this is not the time.

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[40]As noted above, TSCA does not apply herein as Congress has not waived the Army's sovereign immunity.

Accordingly, I find and conclude that Respondent shall also pay to Dr. Hall the amount of $250,000,00 as exemplary and punitive damages for its egregious actions herein and as a deterrent for other employers who may be similarly inclined in the future.

F. INJUNCTIVE RELIEF

The Complainant requests, if reinstatement is ordered, that the ALJ Order that a new unbiased review of Dr. Hall's security clearance and CPRP status be conducted, unless Dr. Hall could be provided under normal procedure, either a clearance or CPRP approval without a new review, following fair and proper procedures which allow for Complainant to make his case. Complainant requests that his record be expunged of all adverse information, that Dugway be prohibited from further retaliation and that the Order in this case be publicly posted at Dugway.

As in **Migliore**, some injunctive relief is appropriate here. In **Migliore**, this Administrative Law Judge held:

> Respondent is hereby ordered to cease and refrain from discriminating against Complainant based upon her now-recognized protected activity. Further, Respondent is hereby ordered to immediately expunge Complainant's personnel file of any and all negative references related to her protected activity. **See McMahan v. California Water Quality Control Bd.**, 1990-WPC-1 (Sec'y July 16, 1993).
>
> Second, Complainant requests that Respondent be ordered to "publish, through news release and correspondence with EPA Region One, a retraction of all negative and false statements, reports and comments made to outside entities about Complainant's professional performance and abilities." (CX 126 at 209) I hereby deny this request as too broad and cumbersome. Rather, I hereby recommend that Respondent post a written notice in a centrally located area frequented by most, if not all, of Respondent's employees for a period of sixty (60) days, advising its employees that the disciplinary action taken against Complainant have been expunged from her personnel record and that Complainant's claims have been decided in her favor. Further, I hereby recommend that Respondent make available the Final Order of the Administrative Review Board and/or Secretary of Labor, when issued, to any employee or individual requesting it. Further, I recommend that Respondent forward a copy of

> the final order of the Administrative Review Board and/or Secretary of Labor to the EPA Region One office. ... I hereby recommend that Respondent be Ordered to cease all discriminatory action, and refrain from taking retaliatory action against Complainant in the future based upon her protected activities as noted in this Recommended Decision and Order.

Migliore, **supra**.

As I also ordered in another decision,

> Respondent shall immediately expunge from Complainant's personnel records all derogatory or negative information contained therein relating to Complainant's employment with the Respondents and his termination on September 10, 1992. Respondent shall also provide neutral employment references when inquiry is made about Complainant by another firm, entity, organization or an individual.

Creekmore, **supra**. As in these prior cases, Dr. Hall's record should be cleared and Dugway is prohibited from all further retaliation against Dr. Hall and will be required to publicly post the Order so stating, and I so find and conclude, and an appropriate **ORDER** will be entered herein.

G. ATTORNEY FEES AND LITIGATION COSTS AND EXPENSES

The law provides for recovery of attorney fees and litigation expenses and costs by a prevailing Complainant. For example,

> Under the SWDA, a prevailing party in a so-called whistleblower case is entitled to recover costs for attorney fees and expenses. 42 U.S.C. § 6971. In this context, a party may be considered to have prevailed if he or she succeeds on any significant issue in litigation which achieves some of the benefits the party sought in bringing the suit. **Hensley v. Eckerhart**, 461 U.S. 424, 433 (1983). I have found and concluded that Complainant is a prevailing party, and thus, her counsels are entitled to a reasonable fee.

This Administrative Law Judge Ordered at the close of trial in the instant case that any attorney fees and costs petition be submitted separately after issuance of the Decision. Accordingly, Complainant's attorney shall file the usual fee petition within thirty (30) days of receipt of this Recommended Decision and Order

and Respondent's counsel shall have fourteen (14) days to file a response thereto.

This Administrative Law Judge, in calculating attorney fees under the whistleblower statutes, will utilize the lodestar method that requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate. **See Clay v. Castle Coal and Oil Co., Inc.**, 1990-STA-37 (Sec'y, June 3, 1994). The fee petition must be based on records providing details of specific activity taken by counsel and indicating the date, time and duration necessary to accomplish the specific activity. **Sutherland v. Spray Sys. Envtl.**, 1995-CAA-1 (ARB July 9, 1996); **West v. Sys. Applications Int'l**, 1994-CAA-15 (Sec'y Apr. 19, 1995). Complainant's counsel has the burden to establish the reasonableness of the fees. **West v. Sys. Applications Int'l**, 1994-CAA-15 (Sec'y Apr. 19, 1995).

V. **RECOMMENDED ORDER**

Based upon the foregoing findings of fact, conclusions of law and upon the entire record, I **RECOMMEND** Complainant Dr. David W. Hall be awarded the following remedy:

1) Respondent, U.S. Army Dugway Proving Ground, shall pay to Complainant an award of $150,000 in front pay representing front pay for a period of three (3) years.

2) Respondent shall pay to Complainant an award of $336,419.00 in back pay. Further, I recommend that Complainant be awarded prejudgment interest on the award of back pay, as calculated under 26 U.S.C. §6621.

3) Respondent shall pay Complainant compensatory damages in the amount of $450,000.00 representing mental anguish and emotional distress, adverse physical health consequence, and loss of professional reputation.

4) Respondent shall pay to Complainant the amount of $300,000.00 as exemplary damages and as a deterrent to other employers.

5) Respondent shall pay to Complainant the amount of $100,000.00 for the loss sustained by his premature withdrawals from his Federal Thrift Savings Plan.

6) Respondent shall pay to Complainant the amount of $50,000.00 for the economic loss to his forced bankruptcy and damage to his credit record.

7) Respondent shall pay to Complainant the amount of $50,000.00 representing the reduction in his retirement benefits due to his early and forced retirement.

8) Respondent shall pay to Complainant the amount of $30,000.00 representing the reasonable tax losses that will be incurred by him with reference to the awards being made herein.

9) Respondent shall pay to Complainant the amount of $10,000.00 representing the reasonable estimate of the counseling and therapy sessions that will be required by him in the forseable future to restore him to the **status quo ante** he enjoyed prior to this conspiracy.

10) Respondent shall pay an attorney fee award to Attorney Harrison after his fee petition is filed and Attorney Skeen's comments are received.

It is **FURTHER RECOMMENDED** that

11) Respondent shall immediately expunge from Complainant's personnel file any and all negative references relative to his protected activity.

12) Respondent shall post a written notice in a centrally located area frequented by most, if not all, of Respondent's employees for a period of sixty (60) days, advising its employees that the disciplinary action taken against Complainant has been expunged from his personnel record and that Complainant's complaints have been decided in his favor.

13) Respondent shall also forward a copy of the Final Order of the Administrative Review Board, to the EPA, Office of Enforcement and Compliance Monitoring, 401 M Street, NW, Washington, DC, 20460, and to the Utah State Division of Environmental Compliance in Salt Lake City, Utah, and further shall make a copy of said order available upon request by other Respondent employees, military personnel or other individuals requesting same.

A

DAVID W. DI NARDI
District Chief Judge

Boston, Massachusetts

DWD:jl

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §§ 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. **See** 29 C.F.R. §§ 24.7(d) and 24.8.